Supreme Court, U. S.
FILED
JUN 4 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. --- 78-1812

HEATHER ELIZABETH O'DONNELL, and KATHLEEN ANNE O'DONNELL, MICHAEL BRENT O'DONNELL, and TIMOTHY HUGH O'DONNELL, by their next friend, HEATHER ELIZABETH O'DONNELL,
Appellants,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Insurance Corporation,
Appellee.

AN APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

CALDER, KIRKENDALL AND LOGEMAN
ROBERT E. LOGEMAN (P23789)
Counsel for Appellants
301 West Michigan Avenue
Suite Four Hundred
Ypsilanti, Michigan 48197

EUGENE F. BLACK
Co-counsel for Appellants
2700 Strawberry Lane
Port Huron, Michigan 48060

Interstate Brief & Record Co., Wurlitzer Bldg., 1509 Broadway, Detroit, MI 48226
962-8745 962-8746

TABLE OF CONTENTS / SUMMARY OF ARGUMENT

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INCLUDED 2

QUESTIONS PRESENTED 3

STATEMENT OF THE CASE 4

The O'Donnell family, as a result of the death of Mr. O'Donnell in an automobile accident, were entitled to Michigan no-fault insurance benefits and Social Security survivors benefits. Pursuant to the Michigan statute challenged, the O'Donnell family was denied no-fault insurance benefits for every Social Security dollar received and limited to a maximum statutory recovery of $1,000 per month irrespective of actual losses of support sustained. While others similarly situated, at the same no-fault premium, are allowed to recover full no-fault benefits up to $1,000 per month and full private collateral benefits irrespective of the statutory maximum and actual losses sustained. The Michigan Supreme Court rejected the O'Donnell family's Equal Protection and Due Process challenges to the statutory classification based on the source of collateral benefits received.

Page

THE FEDERAL QUESTIONS ARE SUBSTANTIAL . . 7

Michigan and seven other states have indirectly upsurped the congressional determination of "needy" by denying a variety of federal assistance recipients no-fault benefits for every federal dollar received. This case is representative of the wide multistate class covering potentially thousands of federal assistance recipients who have been denied millions, if not billions, of dollars in no-fault benefits by the state's use of federal dollars to discharge private no-fault insurance contract obligations. The state's indirect assertion of power over federal funds is an important multistate issue of enormous financial implications and an important unsettled question of the federal constitutional law.

In this case, the Michigan Supreme Court approved the legislative classification which denies no-fault benefits to the O'Donnell family for every Social Security survivors dollar received and limits the family's recovery to a maximum joint recovery of $1,000 per month irrespective of the actual losses sustained. However, similarly situated individuals, at the same premium, are allowed to receive full no-fault benefits and private collateral benefits irrespective of actual losses sustained and in excess of the statutory maximum. The Michigan Supreme Court stated that the legislative purposes advanced by the statutory classification were to make available optional additional coverage, provide minimum premium availability and eliminate unwanted duplication. The O'Donnell family respectfully

Page

submits that these legislative objectives are equally advanced by an elective governmental setoff and an elective private collateral benefit setoff. Thus, the legislative goals identified by the Supreme Court do not provide a rational basis for the *difference* in the statutory classification of governmental and private collateral recipients.

The O'Donnell family respectfully submits that the statutory classification of governmental and private collateral recipients is a denial of Equal Protection and Due Process of the laws guaranteed by the Federal Constitution.

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases:

Dandridge v. Williams, 397 US 471 (1970) 16

Flemming v. Nestor, 363 US 603 (1960) 15,16

Jimeniz v. Weinberger, 417 US 628 15,16

Massachusetts Board of Retirement v. Murgia, 427 US 307 (1976) 12

Mathews v. DeCastro, 429 US 181 (1976) 12

Mathews v. Lucas, 427 US 495 (1976) 12

O'Donnell v. State Farm Mutual Automobile Insurance Company, 70 Mich App 487, 245 NW2d 801 (1976) 2

Page

O'Donnell v. State Farm Mutual Automobile Insurance Company, 404 Mich 524, —NW2d— (1979) 2

Richardson v. Belcher, 404 US 78 (1971) 15,16

Trimble v. Gordon, 430 US 762 (1977) 12

United States Dept. of Agriculture v. Moreno, 413 US 528 (1973) 15

Constitutional Provisions and Statutes:

U.S. Const. Am. XIV, §1 ..... 3,5;A89

MCLA 500.3101(1) 4;A89

MCLA 500.3102 ..... 4;A89-A90

MCLA 500.3105(1),(2)(3) 4;A90

MCLA 500.3108 ..... 4;A91

MCLA 500.3109(a) 5,6,12,13;A91-A92

MCLA 500.3109(1) 2,3,5,6,7,12

MCLA 500.3110(1),(a),(c) 4;A92

MCLA 500.3145 11

MCLA 500.3179 9

1971 Fla. Laws, Ch. 71-252 §7(4) 8

1973 Hawaii Sess. Laws, Act 203 §294-5 ..... 8;A93

1974 Ky. Acts, Ch. 385 §12(1) 8;A94

1973 Nev. Stats., Vol. 1, Ch. 530 §12, §33 .... 8;A94

1973 N.J. Laws, Ch. 70 §6 ..... 8;A95

1973 N.Y. Laws, Ch. 13 §671(2)(b) 8;A92

Page

1974 Pa. Laws, No. 176, §206(a) 8;A93

1973 Utah Laws, Ch. 55, §7(3) 8;A95

H.R. 1597, 95th Cong., 1st Sess (1977) §210 .... A96

H.R. 2300, 95th Cong., 1st Sess (1977) §2(16) ... A97

H.R. 2508, 95th Cong., 1st Sess (1977) §3(9) .. A97-A98

H.R. 5149, 95th Cong., 1st Sess (1977) §208 .. A96-A97

H.R. 13048, 95th Cong., 2d Sess (1978) §109 ... A99

S. 354, 94th Cong., 2d Sess (1975) §208 ..... A96

S. 1381, 95th Cong., 2d Sess (1977) §109 ..... A99

28 USC §1257(2) 2

42 USC §402(e),(g) 4

42 USC §415 4

Miscellaneous:

L. Matthews, BLASHFIELD AUTOMOBILE LAW AND PRACTICE, 3rd (Cum. Supp. to Vol. 7, Ch. 275 1978) 7

IN THE

Supreme Court of the United States

October Term, 1978

No. ---

HEATHER ELIZABETH O'DONNELL, and KATHLEEN ANNE O'DONNELL, MICHAEL BRENT O'DONNELL, and TIMOTHY HUGH O'DONNELL, by their next friend, HEATHER ELIZABETH O'DONNELL,
Appellants,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Insurance Corporation,
Appellee.

AN APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

Heather Elizabeth O'Donnell, and her three minor children appeal the Michigan Supreme Court's opinion finding no equal Protection or Due Process violation of the Michigan No-Fault Automobile Insurance statute which denies no-fault benefits to the extent social security survivors benefits are received.

OPINIONS BELOW

The Michigan Supreme Court opinion was reported at 404 Mich 524, — NW2d — (1979) (A. 1 to A. 63). Application for rehearing was denied March 8, 1979 (A. 65). The Michigan Court of Appeals decision was reported at 70 Mich App 487, 245 NW2d 801 (1976) (A. 66 to A. 83). The unpublished Circuit Court opinion is included in the appendix (A. 83 to A. 84).

JURISDICTION

In this suit for breach of contract and declaratory judgment the Michigan Supreme Court on January 4, 1979, sustained the constitutionality of a Michigan statute (A. 1). The application for rehearing was denied on March 8, 1979 (A. 65). The notice of appeal to this Court was filed with the Michigan Supreme Court on May 2, 1979, with the Court of Appeals on May 3, 1979, and with the Circuit Court on May 1, 1979. The Michigan Supreme Court Clerk would recall and certify the records if requested.

This appeal is being docketed in this Court within 90 days from the Michigan Supreme Court's denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

MCLA 500.3109(1)

> Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the

personal protection insurance benefits otherwise payable for the injury.

The Fourteenth Amendment of the United States Constitution and other relevant portions of the Michigan No-Fault Insurance Act are set forth in the appendix (A. 89 to A. 92).

QUESTIONS PRESENTED

I.

WHETHER THE PROVISION OF THE MICHIGAN NO-FAULT LAW, MCLA 500.3109(1), IS AN UNCONSTITUTIONAL VIOLATION OF EQUAL PROTECTION AND DUE PROCESS OF LAWS IN UNREASONABLY DIVIDING THE NATURAL CLASS OF NO-FAULT RECIPIENTS INTO TWO SUBCLASSIFICATIONS EXTENDING THE RIGHT TO FULL NO-FAULT BENEFITS AND FULL PRIVATE COLLATERAL BENEFITS TO ONE SUBCLASSIFICATIONS, WHILE DENYING TO SIMILARLY SITUATED GOVERNMENTAL ASSISTANCE RECIPIENTS THE RIGHT TO GOVERNMENTAL ASSISTANCE AND FULL NO-FAULT BENEFITS

II.

IF AN ELECTIVE GOVERNMENTAL SETOFF AND AN ELECTIVE PRIVATE SETOFF EQUALLY ADVANCE THE LEGISLATIVE OBJECTIVES, AS IDENTIFIED BY THE MICHIGAN SUPREME COURT, OF OPTIONAL ADDITIONAL COVERAGE AT INDIVIDUAL EXPENSE, MINIMUM PREMIUM AVAILABILITY, AND ELIMINATION OF UNWANTED DUPLICATION, DID THE COURT ERRONEOUSLY CONCLUDE THAT THERE WERE DISTINGUISHABLE CHARACTERISTICS, RELEVANT TO THOSE LEGISLATIVE OBJECTIVES, FOR THE DIVERSE STATUTORY TREATMENT BASED SOLELY ON THE SOURCE OF THE COLLATERAL BENEFITS?

STATEMENT OF THE CASE

On February 19, 1974[1], GARY B. O'DONNELL was killed in an automobile accident. His widow, HEATHER O'DONNELL, and their three minor children, were entitled to federal social security survivors benefits (mother's and children's benefits) 42 USC §402 (e); 42 USC §402 (g); totalling $556.00 per month (A. 25). During the appeal, social security benefits gradually increased to $756.80 per month because of inflationary adjustments (A. 25) 42 U.S.C. §415.

In addition since the actual losses of support were in excess of the maximum no-fault benefits, the O'Donnell family was entitled to the maximum no-fault benefits of $1,000 per month for three years from their insurer, State Farm. However, pursuant to statute, State Farm was compelled to reduce the O'Donnell's no-fault benefits for every social security dollar received.

The Michigan No-Fault Automobile Act is compulsory for all registered motor vehicles[2] and provides criminal sanctions for non-compliance[3]. The benefits are provided by private no-fault insurers to their own insureds without regard to fault[4]. In case of death, the dependent survivors[5] receive no-fault insurance benefits for losses of support up to the statutory maximum of $1,000 per month for 3 years[6].

---

[1] A.2; A.24; (complaint par. 4);

[2] MCLA 500.3101(1); (A. 89);

[3] MCLA 500.3102; (A. 89 to A. 90);

[4] MCLA 500.3105 (1), (2), (3); (A. 90);

[5] Wife and children surviving dependents, MCLA 500.3110(1), (a), (c); (A. 92);

[6] MCLA 500.3108; (A. 91);

At the time of Mr. O'Donnell's death, the No-Fault Act required that no-fault benefits be reduced by any governmental benefits received[7]. However, a recipient of no-fault benefits and other collateral private benefits received both benefits in full without any setoff. Approximately 3 1/2 months after Mr. O'Donnell's death, the Michigan legislature amended the No-Fault Act to offer recipients of no-fault benefits and private collateral benefits a choice of full recovery of both benefits or lower no-fault benefits at "appropriately reduced premium rates."[8]

HOW THE FEDERAL QUESTION WAS PRESENTED

On April 23, 1975, the O'Donnell family filed a complaint in the Michigan Circuit Court against State Farm, alleging breach of contract for failing to pay $1,000 per month in no-fault benefits and for a declaration that the governmental benefit setoff of the No-Fault Act violated Due Process and Equal Protection guarantees of the Fourteenth Amendment of the United States Constitution. Essentially, the complaint alleged that the governmental setoff was an arbitrary and discriminatory bifurcation of the natural class of no-fault beneficiaries into two subclasses, governmental recipients and private collateral benefit recipients. The governmental setoff resulted in denied or reduced no-fault benefits for governmental recipients but allowed full recovery of no-fault benefits to similarly situated recipients of private collateral benefits (A. 25; A. 67).

---

[7] MCLA 500.3109(1); set forth in Constitutional Provisions and Statutes Involved, infra.

[8] MCLA 500.3109(a); (A. 91 to A. 92)

State Farm filed a motion for summary judgment admitting the $1,000 per month no-fault obligation and the reduction for social security benefits received. The trial court order granting summary judgment ruled that there was no breach of contract and that State Farm's policy of insurance, conforming to the Michigan statute, was not engaged in state action, and hence the constitutional challenge was unsupportable as a matter of law (A. 26; A. 67).

The Michigan Court of Appeals in a 2 to 1 decision reversed the trial court and ordered an entry of judgment for the O'Donnell family. The majority opinion held that the classification allowing recovery of no-fault benefits and private insurance benefits for some no-fault recipients while denying full no-fault benefits to governmental recipients for any governmental benefits received was arbitrary and unreasonable (A. 69; A. 72).

The Michigan Supreme Court in a 4 to 3 decision, dated January 4, 1979, reversed the Court of Appeals. The majority opinion found MCLA 500.3109(1) did not violate the due process or equal protection clauses of the federal or state constitution (A. 1; A. 2; A. 10). The majority also upheld the elective private insurance setoff, MCLA 500.3109(a), over the protests of the O'Donnell family, despite the fact that the elective setoff provision was not enacted or given effect until June 3, 1974, some 104 days *after* Mr. O'Donnell's death and the no-fault rights vested prior to such *ex post facto* legislation. The majority opinion expressly limited its

holding to the social security survivors benefits before the court (A. 2). Justice G.M. Williams wrote a 36 page dissenting opinion on behalf of three justices (A. 20 to A. 62). A timely request for rehearing was filed on January 23, 1979 and denied on March 8, 1979.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

A.

MICHIGAN AND SEVEN OTHER STATES HAVE STATUTORY PROVISIONS DENYING NO-FAULT BENEFITS IN WHOLE OR IN PART TO PERSONS RECEIVING VARIOUS FEDERAL ASSISTANCE FUNDS.

The concept of no-fault automobile insurance has been adopted in 24 states[1]. The Michigan statute challenged in this proceeding provides that any benefits received under any federal or state law shall reduce the no-fault insurance benefits otherwise payable, MCLA 500.3109(1).

This concept of using a variety of federal assistance funds to discharge private insurance no-fault obligations has also been adopted in seven other states:

---

[1] L. Matthews, Blashfield Automobile Law and Practice, 3rd (Cum. Supp to Vol 7, ch. 275 1978) p. 7

New York[2], Pennsylvania[3], Hawaii[4], Nevada[5] (repealed 1977), Kentucky[6], New Jersey[7], Utah[8], and Florida[9]. In addition, under a number of proposed federal no-fault bills, the use of federal and state funds to reduce private insurers' no-fault obligations has been repeatedly proposed.[10]

This constitutional challenge has immediate multistate and national significance to the beneficiaries of federal assistance funds. The legal issues presented transcend far beyond the boundaries of Michigan and are significant, compelling subjects of national, federal constitutional interpretation.

---

[2] (A. 92) (social security disability benefits or federal or state workmen's compensation)

[3] (A. 93) (all federal and state statutory benefits — except medicaid and certain medicare benefits)

[4] (A. 93) (social security, workmen's compensation, public assistance laws, etc.); amended 1977, c166 §3 to exclude social security survivors' benefits from the setoff.

[5] (A. 94) (social security, railroad retirement, F.E.L.A., workmen's compensation); amended 1977, Nevada Stat., Chp. 53; §12, §33 to apply only to workmen's compensation.

[6] (A. 94) (social security, workmen's compensation)

[7] (A. 95) (medicare, employees temporary disability statutes, workmen's compensation)

[8] (A. 95) (military benefits, workmen's compensation or any similar plan)

[9] (A. 95) (medicaid or workmen's compensation)

[10] (A. 96 to A. 99)

B.

THE ISSUES PRESENTED INVOLVE ENORMOUS FINANCIAL CONSEQUENCES TO A MULTITUDE OF FEDERAL ASSISTANCE RECIPIENTS UNDER THE VARIOUS NO-FAULT STATUTES ALLOWING GOVERNMENTAL SETOFFS.

The State of Michigan has had no-fault insurance and the governmental benefit setoff since October 1, 1973, MCLA 500.3179. Thus, over the last 4 1/2 years, every social security survivor recipient whose decedent died in an automobile accident in Michigan has been denied the no-fault benefits otherwise provided by statute. Furthermore, the broad Michigan language referring to any governmental benefit received under a federal law would, subject to the Michigan Supreme Court interpretation, apply to social security disability, state and federal pensions, veterans benefits, medicare, and a variety of other federal assistance programs.

Furthermore, the other seven state statutes cited above have also excluded federal recipients from full no-fault benefits since their enactment. This tremendously broad class of people represents an enormous financial savings that various state insurers have enjoyed under the governmental setoff provisions.

The *O'Donnell* case and the economic consequences brought by the Michigan governmental setoff is a fair and representative example of the plight of federal recipients under many no-fault plans. The O'Donnell family paid for social security survivors benefits and paid the uniform no-fault premium (State Farm's brief in the Michigan Supreme Court at p. 35) for full no-fault benefits, but were denied the recovery of full no-fault benefits solely on the basis of the *source*

of the other funds received (governmental). The mandates of the Michigan statute have overridden the congressionally determined "needy" and indirectly placed those federal funds in the coffers of the private automobile insurers. Even assuming, *arguendo*, that these insurers benefit savings have been spread uniformly to all Michigan motorists, the Michigan statute has singled out social security and other governmental recipients to suffer deprivation of no-fault benefits due them (50% to 75% in the case of O'Donnells') to provide cheaper insurance to all Michigan motorists by this arbitrary cost cutting class legislation (A. 56 to A. 58, Williams' dissent).

The amount in dispute between the O'Donnell family and State Farm is in excess of $20,000 (A. 25; A. 67). However, when every social security survivors recipient, social security disability recipient, veterans benefit recipient, medicaid and other federal benefit recipients are totalled, the potential amounts in dispute are astronomical.[11] State Farm, when discussing the *elective* private collateral setoff, attached to its reply amici brief in the Michigan Supreme Court exhibits claiming that the private coordination would save ninety million ($90,000,000.00) dollars per year. If similar savings were achieved by the governmental setoff, the total amount in controversy in Michigan alone would exceed four hundred million ($400,000,000.00) dollars. In Michigan and in the other seven states where federal governmental benefit

---

[11] Since a summary judgment was entered in the trial court against the O'Donnell family, no discovery or trial proofs are available.

reductions are allowed, the total amount in controversy may involve billions of withheld no-fault benefits from state and federal governmental recipients. Also, because of statutory limitations of action and limitations of first party benefit recovery, such as Michigan's one year back rule,[12] the delay in national federal constitutional determination results in irrecoverable losses of no-fault benefits to governmental recipients who have not filed suit and a corresponding profit to no-fault insurers, irrespective of the constitutionality of the statute.

The O'Donnell family respectfully submits that the tremendously broad class of federal recipients involved, the multistate statutes and the astronomical amounts in dispute present a compelling and immediate need for federal constitutional examination and decision.

C.

THE LEGISLATIVE OBJECTIVES IDENTIFIED IN THE MAJORITY OPINION DO NOT RATIONALLY SUPPORT THE STATE'S OFFICIOUS REALLOCATION OF FEDERAL ASSISTANCE FUNDS BY THE STATUTORY BIFURCATION OF NO-FAULT RECIPIENTS ACCORDING TO THE SOURCE OF COLLATERAL BENEFITS RECEIVED.

The Michigan No-Fault Act creates a natural class of no-fault beneficiaries who are entitled to private no-fault contractual insurance benefits. The bifurcation of no-fault recipients into subclasses based solely upon the source of collateral benefits received lacks uniformity in treatment of similarly situated persons.

---

[12] MCLA 500.3145

All Michigan motorists pay the same uniform premium for no-fault coverage but all do not receive the same benefits; MCLA 500.3109(1) carves out an exception for governmental recipients and denies them no-fault benefits otherwise payable and limits their maximum recovery to $1,000.00 irrespective of actual losses, while others similarly situated are allowed to receive full no-fault benefits and full collateral private benefits. The elective private setoff does not create uniformity but rather merely adds an option to the privileged subclass of no-fault recipients entitled to no-fault benefits and private collateral benefits. The elective private setoff allows a private collateral benefit recipient to recover full no-fault benefits and full private collateral benefits, not subject to the statutory maximum of $1,000 per month, or to elect, at appropriately reduced premium rates, deductibles and exclusions to reduce the no-fault benefits payable. Private collateral benefit recipients by MCLA 500.3109(a) are offered larger no-fault benefits than those received by governmental recipients at the same uniform premium rate or a lower premium rate. From the perspective of premiums or benefits, the elective setoff simply increased the disparate treatment between similarly situated no-fault recipients.

In economic regulations the constitutional scrutiny is not a toothless judicial examination, *Mathews* v. *Lucas*, 427 US 495, 510 (1976); *Mathews* v *DeCastro*, 429 US 181, 185 (1976). The statutory classification must rationally further the purpose identified by the state for the statutory subclassifications, *Massachusetts Board of Retirement* v. *Murgia*, 427 US 307, 314 (1976); or the purpose as stated and identified by the highest state court, *Trimble* v. *Gordon*, 430 US 762, 768, 770, 775 (1977).

In this case, the majority opinion asserted that the statutory subclassification between governmental and private recipients was rationally related to the legislative objective of making additional coverage available at the expense and election of the individual (A. 13).

An elective private setoff provision, MCLA 500.3109(a), would advance the rational legislative objectives of minimum premium cost availability, elimination of unwanted duplication, and optional additional coverage. However, the same objectives would be equally advanced by an elective governmental setoff. Both Social Security recipients and private insurance recipients may have economic needs and/or wages exceeding the maximum no-fault coverage of $1,000 per month. If the governmental setoff were elective, the social security recipients could elect to meet their additional needs by declining the governmental setoff. The individual would bear the sole burden of unreduced no-fault premiums. In both cases there is a perceived need for supplemental coverage and that coverage is borne by the individual in higher private insurance premiums or unreduced no-fault premiums. The additional coverage option does not rationally support the *difference* in statutory subclassification between compelled governmental setoffs and elective private insurance setoffs. Rather, such a legislative goal would be equally served by allowing governmental recipients the same elective setoff option as similarly situated private insurance recipients.

Similarly, the legislative objective of offering a minimum no-fault premium for the poor and disadvantaged would be equally advanced by an elective governmental setoff as well as an elective private insurance setoff. Assuming *arguendo*, that the present so-called uniform premium contains a uniform premium reduction for the compulsory governmental setoff,[13] an elective governmental setoff would offer the poor and disadvantaged the opportunity to elect the governmental setoff. Thus, in theory, the same minimum premium would be available under an elective governmental setoff provision. The poor would not be compelled to purchase duplicative governmental or private insurance coverage unless they elected to pay additional no-fault premiums for the additional coverage. An elective governmental setoff and an elective private insurance setoff would eliminate all unwanted additional or duplicative coverage. The coverage provided and the corresponding premium paid would reflect the individual's coverage needs and the corresponding individual's premium burden chosen.

The majority opinion also finds no Due Process violation on the grounds that social security survivors benefits arise out of the same accident as no fault benefits and are "duplicative" and "redundant" (A. 2). However, this record on appeal is totally barren of any evidence, or even the assertion by State Farm that the receipt of full no-fault benefits and full social security

---

[13] The majority opinion apparently assumes some uniformity in the governmental setoff and corresponding uniform premium charge. However, O'Donnell's argue, and Justice Williams' opinion (A. 39) cogently explained, how a compelled governmental setoff and a uniform premium charged to Social Security recipients for less benefits received is irrational and discriminatory. It forces a small class of governmental recipients to subsidize a premium savings to all Michigan Motorists including those who receive private insurance benefits.

benefits would have resulted in any *actual* duplication or redundant benefits to the O'Donnell family.[14]

In essence, the perceived evil of duplication, as an abstract proposition is equally applicable to all collateral private or governmental benefits arising out of the same accident. Both subclasses may have collateral benefits payable arising from the same accident, losses in excess of the statutory maximum, and the same possibility of duplication. The fact that Social Security survivors benefits and no-fault benefits were payable because of an automobile fatality is a distinction without a policy of difference. The two subclassifications stand on equal footing, and the potential for duplication is the same for both; hence to conclusively deny no-fault benefits to governmental recipients is a patently arbitrary classification, utterly lacking in rational justification under the Due Process Clause[15] and a denial of equal protection of the laws.[16] The statutory scheme of duplication elimination is underinclusive in that private collateral recipients are allowed duplication without regard to actual loss and overinclusive in that governmental recipients, such as the O'Donnell family, are conclusively denied governmental benefits without regard to actual losses in excess of the no-fault statutory $1,000 maximum per month.

---

[14] The O'Donnell's, victims of summary judgment below, offered in the application for rehearing to show the Michigan Supreme Court that Mr. O'Donnell's annual gross earnings prior to death were approximately $25,000.00.

[15] *Flemming* v. *Nestor*, 363 US 603, 611 (1960); *Richardson* v. *Belcher*, 404 US 78, 81 (1971).

[16] *Jimenez* v. *Weinberger*, 417 US 628, 637 (1974); *United States Dept. of Agriculture* v. *Moreno*, 413 US 528, 538 (1973).

Lastly, the Michigan Supreme Court's apparent reliance on *Richardson* v. *Belcher*, 404 US 78 (1971), is misplaced. In *Richardson*, the public purse, Social Security, was the beneficiary of a setoff for workmen's compensation benefits received. In a 4-3 decision, the *Richardson* majority held that the setoff was rational and not in violation of due process or equal protection on the grounds that Congress could determine that the need was being met by the states and federal duplication could harm state programs, 404 US 78, 83-84.

The *Richardson* decision is distinguishable and should not be extended to the case presently before this Court for a number of reasons. First, the special deference and latitude in the dispensing of public funds, *Dandridge* v. *Williams*, 397 US 471, 479, 491 (1970); *Jimeniz* v. *Weinberger*, 417 US 628, 633 (1974); *Richardson* v. *Belcher*, 404 US 78, 81 (1971), is inapplicable to this case where private insurance contractual rights are being withheld. Secondly, the rights in dispute here are contractual and expressly distinguished from public expectation in *Richardson*, 404 US 78, 80-81 (1971) and *Flemming* v. *Nestor*, 363 US 603, 611 (1960).

Lastly, as a policy matter *Richardson* focused on the power and latitutde of Congress to preserve public funds when the perceived need is being satisfied by another governmental program. Here, the State of Michigan is attempting to preserve private insurance funds at the expense of the public purse. The compulsory governmental setofr attempts to perpetuate a federal public need by continuing a void in private insurance coverage. The Social Security survivors

benefits are directed to the congressionally determined "needy". Congress, not the Michigan legislature, has the public responsibility in the distribution of federal funds, the rational basis to redefine Michigan no-fault recipients as no longer "needy", and reallocate those federal assistance funds. The Michigan statute indirectly attempts to reallocate federal funds within Michigan's no-fault systems to other private recipients (insurance companies or other insureds). The framework of federalism is threatened by the Michigan statutory assertion of dominion over federal spending.

CONCLUSION

For these reasons it is respectfully submitted that this Honorable Court should note probable jurisdiction of this appeal.

Respectfully submitted,

CALDER, KIRKENDALL AND LOGEMAN

ROBERT E. LOGEMAN (P23789)
Counsel for Appellants
301 West Michigan Avenue
Suite Four Hundred
Ypsilanti, Michigan 48197

EUGENE F. BLACK
Co-counsel for Appellants
2700 Strawberry Lane
Port Huron, Michigan 48060

May 25, 1979

Supreme Court, U. S.
FILED
JUN 4 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1812

HEATHER ELIZABETH O'DONNELL, and KATHLEEN ANNE O'DONNELL, MICHAEL BRENT O'DONNELL, and TIMOTHY HUGH O'DONNELL, by their next friend, HEATHER ELIZABETH O'DONNELL,
Appellants,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Insurance Corporation,
Appellee.

AN APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT APPENDIX

CALDER, KIRKENDALL AND LOGEMAN
ROBERT E. LOGEMAN (P23789)
Counsel for Appellants
301 West Michigan Avenue
Suite Four Hundred
Ypsilanti, Michigan 48197

EUGENE F. BLACK
Co-counsel for Appellants
2700 Strawberry Lane
Port Huron, Michigan 48060

Interstate Brief & Record Co., Wurlitzer Bldg., 1509 Broadway, Detroit, MI 48226
962-8745 962-8746

TABLE OF CONTENTS

	Page
Michigan Supreme Court Opinion	
Majority Opinion	A1
Dissenting Opinions	A20
Michigan Supreme Court January 4, 1979, Order of Reversal	A64
Michigan Supreme Court March 8, 1979, Order Denying Rehearing	A65
Michigan Court of Appeals Opinion	
Majority Opinions	A66,A73
Dissenting Opinions	A76
Trial Court Order Granting Defendant a Summary Judgment	A83
Notice of Taking Appeal to the Supreme Court of the United States	A85
Affidavit of Service Regarding Notice of Taking Appeal	A87
Constitutional Provisions and Statutes Involved	A89
US Const Am XIV, Sec 1	A89
MCLA 500.3101(1)	A89
MCLA 500.3102	A89-A90
MCLA 500.3105(1), (2), (3)	A90
MCLA 500.3108	A91
MCLA 500.3109(a)	A91-A92
MCLA 500.3110(1), (a), (c)	A92

Page

1973 N.Y. Laws, Chp. 13 §671(2)(b) A92

1974 Pa. Laws, No. 176, §206(a) A93

1973 Hawaii Sess. Laws, Act 203, Sec. 294-5 ..... A93

1973 Nev. Stats, Vol 1, Chapter 530, §12, §33 .... A94

1974 Ky. Acts, Chp. 385 §12(1) A94

1973 N.J. Laws, Chapter 70, §6 ..... A95

1973 Utah Laws, Chap. 55, §7(3) A95

1971 Fla. Laws, Vol 1, at p. 1361-1362 ..... A95

H.R. 1597, 95th Cong., 1st Sess. (1977), §210, p. 37 ..... A96

S. 354, 94th Cong., 2d Sess. (1975) §208, p. 90-91. A96

H.R. 5149, 95th Cong., 1st Sess. (1977) §208, p. 62-63 ..... A96-A97

H.R. 2300, 95th Cong., 1st Sess. (1977) §2(16), p. 5-6 ..... A97

H.R. 2508, 95th Cong., 1st Sess. (1977) §3(9), p. 5-6 ..... A97,A98

H.R. 13048, 95th Cong., 2d Sess. (1978) §109, p. 36 ..... A99

S. 1381, 95th Cong., 2d Sess. (1977) §109, p. 41-42 A99

IN THE

Supreme Court of the United States

October Term, 1978

No. ---

HEATHER ELIZABETH O'DONNELL, and KATHLEEN ANNE O'DONNELL, MICHAEL BRENT O'DONNELL, and TIMOTHY HUGH O'DONNELL, by their next friend, HEATHER ELIZABETH O'DONNELL,
Appellants,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Insurance Corporation,
Appellee.

AN APPEAL FROM THE SUPREME COURT OF MICHICAN

JURISDICTIONAL STATEMENT APPENDIX

OPINION

(State of Michigan
Supreme Court

(Filed January 4, 1979)

HEATHER ELIZABETH O'DONNELL and KATHLEEN ANNE O'DONNELL, MICHAEL BRENT O'DONNELL and TIMOTHY HUGH O'DONNELL, by their next friend, HEATHER ANNE O'DONNELL, Plaintiffs-Appellees, v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Insurance Corporation, Defendant-Appellant. No 58833.

BEFORE THE ENTIRE BENCH

M. S. COLEMAN, J. (To reverse)

Section 3109(1)[1] of the Michigan No-Fault Insurance Act[2] requires that the amount of benefits payable under any no-fault insurance policy must be reduced by the amount of benefits payable to a beneficiary by the state or Federal government, but it does not also require an analogous set-off of benefits payable to a beneficiary by private health or accident insurance programs, which persons may voluntarily add to the basic no-fault insurance. The principal question presented is whether § 3109(1) discriminates against the recipients of government benefits in violation of the Equal Protection Clause of the state or Federal constitutions.[3] The Court of Appeals ruled in a 2 to 1 decision that § 3109(1) was unconstitutional.[4] We reverse the decision of the Court of Appeals. The Legislature's judgment that the recipients of private benefits should be treated differently from the recipients of government benefits is supported by a rational basis and should therefore be

sustained. This distinction rationally promotes the legitimate legislative objectives of enabling persons with economic needs and/or wages exceeding the maximum benefits permitted under the No-Fault Act to obtain the supplemental coverage they need and of placing the burden of such extra coverage directly on the shoulders of those persons, instead of spreading it throughout the ranks of no-fault insureds.

A subsidiary question is whether § 3109(1) requires a set-off of Federal social security survivors' benefits such as those received by the plaintiffs as a result of decedent's death and, if so, whether this is totally arbitrary and thus violative of the Due Process Clause of the state or Federal constitutions.[5] We conclude that § 3109(1) does require a set-off of these government benefits but is not arbitrary because the benefits are paid as a result of the same accident and duplicate in varying degrees the no-fault benefits otherwise due. All persons who receive redundant government survivors' benefits arising from one accident are treated the same and all are guaranteed a maximum survivor's loss benefit of $1000 per month for three years. It therefore does not violate the Due Process Clause of the state or Federal constitutions.

This opinion is confined to the facts before the Court and does not purport to encompass other possible government benefits.

I

Plaintiffs' decedent was killed in an automobile accident in 1974. Plaintiffs qualified for survivors' benefits under certain subdivisions of § 402[6] of the Federal Social Security Act[7] which provide for the

payment of secondary benefits to the dependents of a wage earner who is fully qualified to receive primary social security benefits at the time of death.[8] Plaintiffs also qualified for survivors' benefits under the no-fault insurance policy issued by the defendant to the decedent.

Section 3109(1) of the No-Fault Act requires the subtraction of government benefits from no-fault benefits otherwise due:

> "Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury."[9]

The no-fault policy issued by the defendant to the decedent incorporated this legislatively mandated provision:

> "Any amount payable by the company under the terms of this insurance shall be reduced by (a) the amount paid, payable or required to be provided under the laws of any state or the federal government* * *."[10]

Pursuant to this provision, the defendant subtracted the amount of survivors' benefits payable by the Federal government to the plaintiffs from the amount of survivors' benefits payable under the decedent's no-fault policy and sent the plaintiffs a monthly check for the difference. The actual amount received by the plaintiffs from the Federal government and the defendant totaled $1000 per month, the maximum amount authorized by § 3108[11] of the No-Fault Act.

Plaintiffs sued the defendant in circuit court, alleging a breach of the insurance contract and contending that § 3109(1) violated the Due Process and Equal Protection Clauses of the Michigan and United States Constitutions. The Circuit court granted a defense motion for summary judgment. The plaintiffs appealed to the Court of Appeals and that court reversed in a 2 to 1 decision, the majority declaring that § 3109(1) was unconstitutional.[12] The defendant appealed and we granted leave to appeal.

II

In *Shavers v Attorney General*, 402 Mich 554; 267 NW2d 72 (1978), Justice Williams explained the proper approach this Court must take when confronted with an equal protection or due process challenge to socioeconomic legislation such as the No-Fault Act:

> "[I]n the face of a due process or equal protection challenge, 'where the legislative judgment is drawn in question', a court's inquiry 'must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it'. *United States v Carolene Products Co*, 304 US 144, 154; 58 S Ct 778; 82 L Ed 1234 (1938). * * *[W]here the legislative judgment *is supported by 'any state of facts either known or which could reasonably be assumed'*, although such facts may be 'debatable', the legislative judgment must be accepted. *Carolene Products Co v Thomson*, 276 Mich 172, 178; 267 NW 608 (1936)."[14]

In a footnote at the very end of this passage, further guidance was offered as to the limited nature of the Court's role:

> "See *Ferguson v Skrupa*, 372 US 726, 730-731; 83 S Ct 1028; 10 L Ed 2d 93 (1963), where the United States Supreme Court stated:
>
> " '[C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, "we are not concerned * * * with the wisdom, need, or appropriateness of the legislation." Legislative bodies have broad scope to experiment with economic problems * * *. We refuse to sit as a "super-legislature to weigh the wisdom of legislation".' "[15]

The proper test for judging socioeconomic legislation such as the No Fault Act was also stated in *Shavers*

> "The test to determine whether legislation enacted pursuant to the police power comports with due process is whether the legislation bears a reasonable relation to a permissible legislative objective. See *Michigan Canners v Agricultural Board*, 397 Mich 337, 343-344; 245 NW2d 1 (1976).
>
> "The test to determine whether a statute enacted pursuant to the police power comports with equal protection is, essentially, the same. As the United States Supreme Court declared in *United States Dep't of Agriculture v Moreno*, 413 US 528, 533; 93 S Ct 2821; 37 L Ed 2d 782 (1973):
>
> '" 'Under traditional equal protection analysis, a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest.' "[16]

This test recognizes and preserves the constitutional principle of separation of powers, which forms the fundamental framework of our system of government. Its purpose is to make certain that the judiciary does not substitute its judgment for that of the Legislature as to what is best or what is wisest. So long as the Legislature's judgment is supported by a rational or reasonable basis, the choices made and the distinctions drawn are constitutional. The United States Supreme Court and our Court have instructed:

> "If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality'. * * * 'The problems of government are practical ones and may justify, if they do not require, rough accommodations* * *' ".[17]

> "If it be said, the law is unnecessarily severe, and may sometimes do injustice, without fault in the sufferer under it, our reply is: these are considerations that may very properly be addressed to the legislature, but not to the judiciary — they go to the expediency of the law, and not to its constitutionality."[18]

The responsibility for drawing lines in a society as complex as ours — of identifying priorities, weighing the relevant considerations and choosing between competing alternatives — is the Legislature's, not the judiciary's. Perfection is not required:

> "[T]he drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary."[19]

Nor is it necessary that the Legislature deal with every aspect of a problem at the same time:

> "[W]e are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' * * * that a legislature need not 'strike at all evils at the same time,' * * * and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind' * * *."[20]

In short, we do not sit "as a superlegislature to judge the wisdom or desirability of legislative policy determinations".[21] We sit as a court to determine whether there is a rational basis for the Legislature's judgment. If there is, then that judgment must be sustained:

> "It is *not* this Court's role to decide whether the Legislature acted wisely or unwisely in enacting this statute. We will not substitute our own social and economic beliefs for those of the Legislature, which is elected by the people to pass laws."[22]

III

In order to facilitate analysis of whether § 3109(1) violates the Equal Protection Clause of the state or Federal constitutions, we will first discuss the question of whether it requires a set-off of the social security survivors' benefits received by the plaintiffs and, if so, whether this violates the Due Process Clause of the state or Federal constitutions.

Section 3109(1) states:

> "Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury."[23]

One of the most important principles of statutory interpretation is that the words of the statute should be construed in light of the Legislature's intent. See, *e.g.*, *Moore v Department of Military Affairs*, 398 Mich 324; 247 NW2d 801 (1976). The history of § 3109(1) indicates that the Legislature's intent was to require a set-off of those government benefits that duplicated the no-fault benefits payable because of the accident and thereby reduce or contain the cost of basic insurance.

In a letter to the Governor from the Commissioner of Insurance analyzing a series of proposed no-fault bills introduced in 1971, none of which contained a set-off provision, the Commissioner criticized the bills because they tended to "increase the duplication and overlap between auto insurance and other insurance programs, sick leave programs and social security".[24] Subsequent bills did contain set-off provisions.[25] The final version of § 3109(1) was similar to an amendment suggested by the Commissioner.[26] According to the Commissioner, the purpose of the amendment was "to provide a more complete and effective coordination of benefits between Michigan auto insurance and the benefits provided by the laws of all the states and the federal government".[27] As noted by Justice Williams in his opinion in this case, the Commissioner's comments "make clear that the purpose of the § 3109(1) statutory scheme was framed in terms of maintaining or reducing premium costs for all insureds through the elimination of duplicative benefits recovery".[28]

The survivors' benefits received by the plaintiffs pursuant to § 402 of the Federal Social Security Act duplicated the survivors' benefits they received pursuant to the decedent's no-fault insurance policy. The survivors' benefits received pursuant to the no-fault policy were paid as a result of the decedent's death and were based on § 3108 of the No-Fault Act, which states:

> "Personal protection insurance benefits are payable for a survivors' loss which consists of a loss, after the date on which the deceased died, of contributions of tangible things of economic value, not including services, that dependents of the deceased at the time of his death would have received for support during their dependency from the deceased if he had not suffered the accidental bodily injury causing death* * *."[29]

The survivors' benefits received pursuant to § 402 of the Social Security Act were likewise paid as a result of the decedent's fatal accident and served substantially the same purpose as the no-fault benefits:

> "As originally enacted in 1935, the Social Security Act authorized a monthly benefit for qualified wage earners at least 65 years old and a death benefit payable to the estate of a wage earner who died at an earlier age. 49 Stat 622-624. *In 1939 Congress created secondary benefits for wives, children, widows, and parents of wage earners.* See 53 Stat 1362, 1364-1366. *The benefits were intended to provide persons dependent on the wage earner with protection against the economic hardship occasioned by loss of the wage earner's support. Mathews v DeCastro*, 429 US 181, 185-186. Generally speaking, therefore, the categories of secondary beneficiaries were

> defined to include persons who were presumed to be dependent on the wage earner at the time of his death, disability, or retirement." (Emphasis added.)[30]

Thus, the benefits received by the plaintiffs from the Federal government fell within the scope of § 3109(1)'s set-off.

This set-off is not arbitrary and it does have a rational basis. It promotes the valid legislative objectives of insuring payment for economic loss up to $1000 per month for three years and of attempting to reduce or contain the cost of no-fault insurance by eliminating some of the benefit duplication that would otherwise occur. The means chosen, a set-off of duplicative government benefits, is rationally related to that end. It reduces the amount that the insurance companies must pay out, making it possible for them to reduce the amount that they must charge, and it does so only in those situations where the benefits are redundant. Thus, as in the case at bar, all beneficiaries are eligible for up to $1000 per month for three years of survivors' benefits to compensate for their loss. Social security survivors' benefits are never interrupted. Having a rational basis, § 3109(1) does not violate the Due Process Clause of the state or Federal constitutions.

IV

The remaining question is whether § 3109(1) discriminates against the recipients of government benefits in violation of the Equal Protection Clause of the State or Federal constitutions.

It is undisputed that § 3109(1) treats the recipients of government benefits differently than it treats the recipients of private health or accident insurance

benefits. It does not require that private benefits be set off against no-fault benefits otherwise due. Unlike the government benefit recipient, the recipient of private benefits can receive full no-fault survivors' benefits up to the maximum of $1000 per month, plus full private benefits as well.

The mere fact that the Legislature has chosen to draw a distinction between government benefit recipients and private benefit recipients does not mean that § 3109(1) is unconstitutional. If this distinction is supported by a rational basis, then it passes constitutional muster.

The Legislature had to wrestle with several competing considerations when it was deciding whether the act should contain any set-offs and, if so, what kind of set-offs it should encompass.[31] Because the first party insurance proposed by the act was to be compulsory, it was important that the premiums to be charged by the insurance companies be maintained as low as possible. Otherwise, the poor and the disadvantaged people of the state might not be able to obtain the necessary insurance. Thus, there was a viable need for cost cutting measures of some kind. Set-offs were one possibility. Another consideration was that the $1000 per month maximum established by § 3108 would leave many persons with economic losses and needs greater than that amount without adequate compensation. Large families would be especially hard hit by this cap on survivors' benefits. Of course, the maximum recovery could be raised to some higher amount, but this would increase the cost of the program and spread higher premiums over all purchasers.

Faced with this dilemma, the Legislature chose to experiment with a compromise solution. First, all persons would be guaranteed up to $1000 per month survivors' loss benefits under § 3108. This would provide adequate compensation for most people. Second, by virtue of § 3109(1), duplicative government benefits would be set off against no-fault benefits otherwise due. This would make it possible for all persons needing no-fault insurance to obtain it at less cost. Third, no set off would be required for private health or accident insurance benefits. This would enable the persons with incomes or needs exceeding $1000 per month to purchase the extra coverage their families required by paying extra premiums without the hardship of (1) purchasing no-fault insurance, for the basic $1000 coverage and (2) purchasing another $1000 coverage to be set off against the basic insurance and then finally (3) purchasing whatever amount of private insurance in excess of that set-off $1000 required to cover income loss and family needs — all to be purchased with after tax — as opposed to tax — dollars. It was finally resolved that these persons with extra needs would directly bear the burden of those needs; none of that burden would be borne by the no-fault system. The payment of extra premiums would pay in full for the extra coverage. Therefore, there would be no discrimination in this totally voluntary option.

This solution promotes several valid legislative objectives. It attempts to reduce the cost of basic no-fault insurance for everyone and make it possible for most persons to obtain most of the coverage they need.

(It could, in fact, be discriminatory to prevent it.) Section 3109(1), the means chosen by the Legislature, is, as outlined above, rationally related to these legitimate objectives.

It is not necessary that we agree with the wisdom of the judgments made by the Legislature in order to uphold this section of the act. (We may or we may not agree, but that makes no difference.) Nor is it necessary that the supposed beneficial effects envisioned by the Legislature be verified at this time. As stated just a few months ago in *Shavers* with respect to other supposed benefits of the act:

> "The fact that these effects are not yet evident does not diminish the legitimacy of the goals sought to be achieved or the reasonableness of the means adopted. At this early stage in the functioning of the No-Fault Act these long-term developments cannot yet fully be assessed. Indeed, this litigation itself, with its resulting uncertainty as to the viability of the No-Fault Act, may slow the achievement of the act's goals. Our decision in *Manistee Bank, supra*, is particularly relevant to this aspect of the case: it is precisely because regulation in the economic field often deals with long-term developments that the Court treats such legislation with great deference"[32]

In time the Legislature may decide that the benefits originally associated with § 3109(1) have not materialized or that although they have materialized they are not worth the social and economic costs. However, the rational basis for the distinctions drawn by the Legislature between the recipients of government benefits and the recipients of private benefits — primarily the desire to make it possible for persons with requirements exceeding the benefits assured by the No-Fault Act to obtain the extra coverage they need without burdening other no-fault insurance purchasers — requires us to hold that § 3109(1) is constitutional.

V

Section 3109(1) did not attempt to address the problem of overlapping no-fault and private health or accident insurance benefits. Soon after the No-Fault Act was passed by the Legislature, however, an attempt was made to fine tune the set-off provisions so that this kind of duplication could be reduced while still permitting persons with needs exceeding the benefits provided by no-fault insurance to obtain the extra coverage they required. The Legislature enacted § 3109a[33] which states:

> "An insurer providing personal protection insurance benefits shall offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured. The deductibles and exclusions required to be offered by this section shall be subject to prior approval by the commissioner and shall apply only to benefits payable to the person named in the policy, the spouse of the insured and any relative of either domiciled in the same household."

Althought the Legislature did not choose to make this set-off mandatory, as it had done with § 3109(1)'s government benefit set-off, this distinction is justified by the perceived necessity of making it possible for persons with greater needs to obtain the coverage they require and pay reduced rates on the no-fault insurance through deductibles and exclusions approved by the commissioner. That some persons can still slip through the colander of § 3109a and receive additional benefits does not mean the statute is unconstitutional. Mathematical precision is neither possible nor required.

Section 3109a promotes the valid legislative objective of reducing duplicative benefits; the means chosen is rationally related to that end; and the distinctions drawn are supported by a rational basis. This statute is also constitutional.

VI

Our brethren have raised the specter of *Boettner v State Farm Mutual Insurance Co*, 388 Mich 482; 201 NW2d 795 (1972), and *Blakeslee v Farm Bureau Mutual Insurance Co*, 388 Mich 464; 201 NW2d 786 (1972), in a footnote to their opinion.[34] Neither of these cases was raised in the application for leave to appeal or briefed by any of the numerous parties who have participated in this case — and for good reason. Both are inapposite to the case. The question in each was whether certain set-off provisions created by insurance companies violated the Legislature's statutorily declared public policy in favor of full recovery. In the case at bar, the Legislature has statutorily declared that the public policy of this state now favors certain set-offs. We have no authority to invalidate that legislative decision so long as it is supported by some rational basis.

VII

In *Richardson v Belcher*, 404 US 78; 92 S Ct 254; 30 L Ed 2d 231 (1971), the United States Supreme Court was faced with a challenge to a statute similar to th challenge that we face today. The Federal Social Security Act required a set-off of worker's compensation benefits from the social security benefits otherwise due, but did not also require an analogous set-off of private benefits.

The plaintiff claimed this distinction violated the equal protection guarantee implicit in the Due Process Clause of the Federal constitution. The Court found that there was a rational basis for the distinction and affirmed the constitutionality of the set-off. The Court's closing words provide an appropriate conclusion for the case at bar:

> "We have no occasion, within our limited function under the Constitution, to consider whether the legitimate purposes of Congress might have been better served by applying the same offset to recipients of private insurance, or to judge for ourselves whether the apprehensions of Congress were justified by the facts. If the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment."[35]

Reverse. No costs, a public question being involved.

/s/ Mary S. Coleman
/s/ James L. Ryan
/s/ Thomas Giles Kavanaugh
/s/ Charles L. Levin

OPINION FOOTNOTES

[1] MCL 300.3109(1); MSA 24.13109(1).

[2] MCL 500.3101 *et seq.*; MSA 24.13101 *et seq.*

[3] Const 1963, art 1, § 2; US Const, Am XIV.

[4] 70 Mich App 487; 245 NW2d 801 (1976).

[5] Const 1963, art 1, § 17; US Const, AM XIV.

[6] 42 USC 402.

[7] 42 USC 401 *et seq.*

[8] The pleadings do not indicate the specific subdivisions of § 402 under which the plaintiffs qualified for secondary benefits. We assume that they qualified under subdivision e, widow's benefits, and/or subdivision g, mother's benefits.

[9] MCL 500.3109(1); MSA 24.13109(1).

[10] Appellant's appendix, p 12a.

[11] MCL 500.3108; MSA 24.13108.

---

[12] 70 Mich App 492-500; 245 NW2d 802-806.

---

[13] 397 Mich 848 (1976).

---

[14] *Shavers, supra*, 613-614.

---

[15] *Id*, fn 38, p 614.

---

[16] *Id*, 612-613.

---

[17] *Dandridge v Williams*, 397 US 471, 485; 90 S Ct 1153; 25 L Ed 2d 491 (1970); *Weinberger v Salfi*, 422 US 749, 769; 95 S Ct 2457; 45 L Ed 2d 522 (1975).

---

[18] *Sears v Cottrell*, 5 Mich 250, 254 (1858).

---

[19] *Massachusetts Board of Retirement v Murgia*, 427 US 307, 314; 96 S Ct 2562; 49 L Ed 2d 520 (1976), *Ohio Bureau of Employment Services v Hodory*, 431 US 471, 489; 97 S Ct 1898; 52 L Ed 2d 513 (1977).

---

[20] *Katzenbach v Morgan*, 384 US 641, 657; 86 S Ct 1717; 16 L Ed 2d 828 (1966), *New Orleans v Dukes*, 427 US 297, 305; 96 S Ct 2513; 49 L Ed 2d 511 (1976).

---

[21] *New Orleans v Dukes, supra*, 303.

---

[22] *McAvoy v HB Sherman Co*, 401 Mich 419, 439; 258 NW2d 414 (1977).

---

[23] MCL 500.3101(1); MSA 24.13109(1).

---

[24] Gretzinger, *O'Donnell v State Farm Mutual Insurance Co: A Judicial Attempt to Amend Michigan's No-Fault Act*, 1977 DCL Rev 187, 192, fn 36.

---

[25] *Id.*, 192-193.

---

[26] *Id,*. 194.

---

[27] *Ibid.*

---

[28] Opinion of Williams, J, p ——, fn 13.

---

[29] MCL 500.3108; MSA 24.13109.

---

[30] *Califano v Jobst*, 434 US 47, 50; 98 S Ct 95; 54 L Ed 2d 228 (1977).

---

[31] See, generally, *A Judicial Attempt to Amend Michigan's No Fault Act, supra*, 192-195.

---

[32] *Shavers, supra*, 628-629.

---

[33] MCL 500.3109a; MSA 24.13109(1).

---

[34] Opinion of Williams, J, p ——, fn 20.

---

[35] *Richardson, supra*, 84.

OPINION

(State of Michigan
Supreme Court)

Heather Elizabeth O'Donnell, and Kathleen Anne O'Donnell, Michael Brent O'Donnell and Timothy Hugh O'Donnell, by their next friend, Heather Elizabeth O'Donnell, Plaintiffs-Appellees, v State Farm Mutual Automobile Insurance Company, an Illinois insurance corporation, Defendant-Appellant. No. 58833

BEFORE THE ENTIRE BENCH

WILLIAMS, J.

This summary judgment case squarely raises both the facial equal protection and due process[1] viability of § 3109(1) of the No-Fault Insurance Act,[2] MCL 500.3101, *et seq.*; MSA 24.13101, *et seq.* Section 3109(1), commonly referred to as the governmental "set-off" provision, reads as follows:

"(1) Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury."[3] MCL 500.3109; MSA 24.13109.

A similar set-off, however, is not likewise mandated with respect to an insured's directly financed private, collateral insurance benefits.[4] As federal Social Security survivors' benefits supported by wage deductions are at issue in this case, we are not called upon to determine whether a set-off of free governmental transfer payments is constitutionally permissible.

The present controversy arose when defendant no-fault insurer sought to reduce its liability on the

no-fault fund due plaintiffs, the no-fault insured's statutory dependents, by the amount of federal Social Security survivors' benefits for which contributions had been made through Social Security wage deductions.[5]

Plaintiffs first contend that the § 3109(1) statutory scheme operates to deny equal protection of the laws to the arbitrarily drawn class of governmental benefit no-fault insureds. Distilled to its essence, plaintiffs' argument proceeds as follows. All no-fault insureds pay the same premium dollar for presumably identical no-fault coverage. No-fault insureds entitled to the receipt of certain governmental benefits, particularly federal Social Security survivors' benefits, monetarily contribute to that governmental insurance system.[6] No-fault insureds entitled to the receipt of private, collateral insurance benefits likewise monetarily contribute to that private insurance system. Further, the nature of those injuries compensable by the governmental insurance system are frequently also compensable by funds emanating from the private insurance system. Based on these premises shared by both governmental and private, collateral insureds, plaintiffs conclude their syllogism with the contention that § 3109(1) affords these two artificially created classes of similarly situated no-fault insureds widely divergent treatment without rational basis, as the disputed statutory scheme mandates the set-off of certain collateral benefits while not requiring the set-off of other similar collateral benefits solely on the basis of the source or fund from which those benefits spring. In short, plaintiffs contend that there exists no significant difference between a contributory governmental benefit program and a contributory private benefit program; both, therefore, should be treated similarly.

Formulating their analysis with reference to the traditional equal protection test, plaintiffs elaborate that there exists no rational relation between these two legislatively created classes of no-fault beneficiaries, on the one hand, and the admittedly permissible legislative purposes of duplicative benefit elimination or premium cost reduction, on the other, sufficient to constitutionally uphold the difference in treatment afforded these two similarly situated classes under this scheme. Plaintiffs allege that this conclusion is inescapable as duplicative benefit elimination is neither realized practically nor legally through the operation of § 3109(1) since the private beneficiary is permitted to retain duplicative benefits. Further, since the legislatively desired reduction in premium rates, if any, flows equally to both classes of no-fault insureds, its achievement is discriminately borne exclusively by the governmental benefit class of no-fault beneficiaries.

Plaintiffs additionally contend that § 3109(1) denies governmental benefit no-fault beneficiaries due process of law insofar as it mandates the set-off of *all* governmental benefit paid for by the recipient whether or not that benefit is casualty related as no-fault is. It is plaintiffs' position that this statutory scheme does not bear a reasonable relation to an otherwise admittedly permissible legislative purpose. For example, according to its literal language, § 3109(1) would permit the set-off of a contributory governmental longevity pension benefit against a no-fault casualty benefit which is patently not duplicative of the longevity award.

Our opinion, in its simplest form, concludes that it is neither logical nor constitutionally permissible to either eliminate benefit duplication or accomplish premium reduction by subtracting personally paid-for Social

Security survivors' benefits from personally paid-for no-fault benefits while not likewise requiring a subtraction of analogous, personally paid-for private insurance benefits. We reach this conclusion on the following specific grounds: (i) § 3109(1) requires the reduction of alleged duplication in a patently discriminatory manner as it focuses its burden solely on one class of similarly situated no-fault insureds; (ii) the disputed statutory scheme operates to place the burden of commonly shared premium cost reduction, if any, on the Social Security survivor beneficiary class alone; and (iii) there exists no rational basis for subtracting paid-for *longevity* benefits from a paid-for *casualty* benefit since in no sense are such paid-for benefits duplicative. In reaching this conclusion, we are mindful that we are not dealing with the elimination of duplicative *ex gratia* governmental transfer payments.

We agree that, while a superficial distinction may exist between a contributory governmental insurance system and a contributory private insurance system, there exist no logically distinguishable characteristics relevant to the permissible legislative judgment which constitutionally justify the disparate treatment afforded those persons receiving collateral governmental benefits, where both classes have received a common premium reduction, if any, and both, at least in the case of federal Social Security survivors' benefits, have made payments to secure the coverage authorizing the governmental and private benefits. See 42 USC 401. As such, the § 3109(1) statutory scheme is facially unconstitutional insofar as it creates two differently treated classes based solely on the source from which the collateral compensation emanates. We, therefore, affirm the Court of Appeals[7] reversal of the trial court's grant of summary judgment to defendant insurer with respect to the constitutionality of this scheme.

I.

FACTS

Gary O'Donnell was fatally injured in an automobile collision on February 19, 1975. Plaintiffs are the wife and children of decedent.

The decedent was insured under a "no-fault" automobile policy issued by defendant State Farm Mutual Automobile Insurance Company, pursuant to the Michigan No-Fault Insurance Act, 1972 PA 294 (hereinafter referred to as the "No-Fault Act" or "the Act").

Plaintiffs are dependents of decedent for purposes of Social Security survivors' benefits under defendant's insurance policy as well as under § 3110 of the No-Fault Act.[8]

Decedent's insurance policy with defendant provided that plaintiffs, as dependents, were entitled to recover survivors' benefits not to exceed $1,000 per 30-day period. Section 3108 of the No-Fault Act[9] provides that plaintiffs are entitled to a maximum survivors' benefits recovery of $1,000 per 30-day period for three years following decedent's death.

Decedent's insurance policy further provided, in relevant part, that:

> "(5) Any amount payable by the company under the terms of this insurance shall be reduced by (a) the amount paid, payable or required to be provided under the laws of any state or federal government; * * *" (See Appellant's Appendix, p 12a)

This reduction in payments mandated by paragraph (5) (a) of defendant's insurance policy is similarly

mandated by § 3109(1) of the No-Fault Act, which states:

> "Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury." MCL 500.3109(1); MSA 24.13109(1).

Plaintiffs qualified for federal Social Security survivors' benefits totaling $556 per month. Pursuant to both paragraph (5) (a) of the insurance policy and § 3109(1) of the No-Fault Act, defendant reduced plaintiffs' $1000-maximum recoverable personal protection insurance benefits by $556 (the amount of federal Social Security survivors' benefits owing plaintiffs) and paid plaintiffs $444 per month. During the pendency of this litigation, plaintiffs' survivors' benefits have increased approximately 35% thereby reducing defendant's no-fault liability to $243.20 per month (Appellee's Brief, p 2).

Plaintiffs filed a two-count complaint in circuit court. Count I alleged that defendant had breached the insurance contract by not paying plaintiffs the full $1,000 per month in benefits (Appellant's Appendix, pp 2a-5a). Count II requested declaratory judgment with respect to the question of whether the statutory scheme relating to § 3109 of the No-Fault Act violated the due process and equal protection clauses of the Michigan and United States Constitutions. Plaintiffs' complaint requested declaratory relief as follows:

> "a. That MCLA 500.3109 is a denial of due process of law as provided in the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the

Michigan Constitution for the reason that said act bears no reasonable relationship to the purpose of the act and that said act deprives those who are receiving governmental benefits from receiving the no fault benefits for which premiums were paid.

"b. That MCLA 500.3109 is a denial of equal protection * * * for the reasons that said act is arbitrary and discriminatory in that it creates two different classes (governmental benefit recipients and non governmental benefit recipients) solely upon the source from which the extra compensation is paid."

Defendant moved for summary judgment on both counts; defendant did not file supporting affidavits. The trial court properly restricted its inquiry to whether the complaint failed to state a claim upon which relief could be granted. GCR 1963, 117.2(1).

The trial court granted defendant's motion for summary judgment. The court held in its order:

"1. That Count I of Plaintiffs' Complaint fails to state a cause of action for the reason that Plaintiffs' Complaint fails to state facts which allege that the Defendant breached any of the provisions of said contract.

"2. That Count II of Plaintiffs' Complaint fails to state a cause of action in that State Farm Mutual Automobile Insurance Company, in entering a contract of insurance which conforms to the requirements of The Michigan Statutes, and in particular MCLA 500.3109, is not itself engaged in state action; consequently, any claim that the contract is itself unconstitutional is unsupportable as a matter of law." (Appellant's Appendix, pp 14a-15a)

On August 4, 1976, the Court of Appeals in separate opinions written by Judge T. M. Burns and Judge V. J. Brennan (Presiding Judge Bashara dissenting) affirmed the trial court's summary judgment as to Count I and reversed the trial court's grant of summary judgment as to Count II. Although referring to "a fundamental due process issue" inherent in the statutory scheme under § 3109(1), the majority opinions essentially concentrated on plaintiffs' equal protection challenge. The thrust of the Court of Appeals holding was that the classification matrix created by the statutory scheme of § 3109(1) — allowing the full receipt of both no-fault personal injury protection insurance benefits and private insurance benefits to one class of persons while deducting from the no-fault personal injury protection benefits of another class of persons any benefits received under the laws of any state or the federal government — did not bear a rational relationship to a "legitimate purpose" and arbitrarily discriminated "against those who receive certain governmental benefits". 70 Mich App 487, 498.

Judge Bashara, in his dissent, would: (1) uphold the trial court's ruling as to Count I of plaintiffs' complaint; (2) overrule the trial court's ruling that there was no "state action" involved in this case; and (3) hold that, with respect to the constitutional questions raised by plaintiffs, "the proper procedure is to remand to the trial judge". 70 Mich App 487, 503.

Defendant appealed the Court of Appeals decision. On August 27, 1976, this Court granted defendant leave to appeal and ordered such appeal to be submitted to this Court with *Shavers* v *Attorney General*, 402 Mich 554; 267 NW2d 72 (1978). In light of our detailed consideration of the no-fault insurance scheme undertaken in *Shavers*, we are now prepared to decide this case on grounds of facial unconstitutionality.

II.

GENERAL ISSUES PRESENTED

After a thorough review of the exhaustive pleadings submitted in this case, we perceive the following issues:

(1) whether the trial court erred in granting for defendant a summary judgment with respect to Count I of plaintiffs' complaint (alleging that defendant had breached the insurance contract in issue by not paying to plaintiffs $1,000 per month in benefits) on the ground that "Plaintiffs' Complaint fails to state facts which allege that the Defendants breached any of the provisions of said contract";[10]

(2) Whether the trial court erred in granting for defendant a summary judgment with respect to Count II of plaintiffs' complaint (requesting declaratory judgment with respect to whether the statutory scheme established by § 3109(1) is violative of due process and equal protection) on the ground that defendant "is not itself engaged in state action";[11] and

(3) Whether the trial court erred in its rationale for disposing of issue (2), *supra*, with respect to whether the statutory scheme established by § 3109(1) violates the due process and equal protection clauses of the Michigan and United States Constitutions. More specifically, based on the facts of this case we will consider whether the § 3109(1) statutory scheme operates to deny that class which has paid for its governmental benefits, including federal Social Security survivors' benefits, both equal protection and

due process of law. We do not express any opinion with respect to the constitutionality of a set-off of non-contributory, *ex gratia* governmental transfer payments.

We answer the first issue in the negative and the latter two constitutional issues in the affirmative.

III.

BREACH OF CONTRACT AND STATE ACTION ISSUES

Issues (1) and (2), *supra*, need not detain us long. As Judge Bashara stated with respect to these issues in his dissenting Court of Appeals opinion:

> "I am of the opinion the trial judge correctly ruled that count I failed to allege breach of contract. The facts pled do not allege breach of contract because the insurance contract provided for a reduction in no-fault benefits to the extent of government benefits received.
>
> "The heart of this lawsuit is count II. The proscriptions of the Fourteenth Amendment, US Const, Am XIV, apply to actions of the state and not merely private conduct. *Shelley* v *Kraemer*, 334 US 1; 68 S Ct 836; 92 L Ed 1161 (1947). The Fourteenth Amendment applies to all state legislation which impairs all due process or denies equal protection. *Civil Rights Cases*, 109 US 3, 11; 3 S Ct 18; 27 L Ed 835 (1883).
>
> "It is undisputed that the basis for paragraph (5) (a) of the insurance policy is the legislative enactment of MCLA 500.3109(1); MSA 24.13109(1). This is a state action. See *Peterson* v *City of Greenville*, 272 US 244; 83 S Ct 1119; 10 L

> Ed 2d 323 (1963). I believe the trial judge erred in determining there was no state action, and consequently failing to consider the constitutional questions raised." 70 Mich App 487, 502-503.

We are persuaded by the majority's conclusion as well as dissenting Judge Bashara's reasoning in this regard. We specifically adopt Judge Bashara's analysis as to issues (1) and (2) of this opinion. Accordingly, we need only further address issue (3), *supra*, *i.e.*, the consideration of plaintiffs' request for declaratory relief with respect to the question of whether the statutory scheme under § 3109(1) violates the due process and equal protection clauses of the Michigan and United States Constitutions.

IV.

PLAINTIFFS' CONSTITUTIONAL ATTACK ON THE § 3109(1) STATUTORY SCHEME: THE APPLICABLE EQUAL PROTECTION AND DUE PROCESS TESTS

Since this final issue involves both facial due process and equal protection challenges to a statutory scheme of the Michigan No-Fault Insurance Act, our discussion in *Shavers* concerning the appropriate constitutional standards in this area is apposite. In *Shavers*, this Court held that the "traditional" substantive due process and equal protection tests espoused by this Court in its consideration of other social welfare and general economic legislation were the applicable standards by which to consider constitutional challenges to the various statutory schemes of the No-Fault Act. 402 Mich 554, 611-618. Manifestly, these tests must likewise be applied in the case at bar.

We articulated the applicable "traditional" due process test in the following terms:

> "The test to determine whether legislation enacted pursuant to the police power comports with due process is whether the legislation bears a reasonable relation to a permissible legislative objective." 402 Mich 554, 612.

Further, citing the United States Supreme Court's admonitions in *United States Dept of Agriculture* v *Moreno*, 413 US 528, 533; 93 S Ct 2821; 37 L Ed 2d 782 (1973), this Court articulated the "traditional" equal protection standard to be applied in this area of concern. We stated:

> " 'Under traditional equal protection analysis, a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest.' " 402 Mich 554, 613.

The details of this test were elaborated upon by Justice Ryan in his separate opinion in *Shavers*:

> "Reduced to its simplest, the equal protection guarantees of both constitutions means that the Legislature may not take what may be termed a 'natural class of persons', split that class in two, and then arbitrarily designate the severed factions of the original unit as two classes and thereupon enact different rules for the treatment of each. However, when there is a natural difference between the situation or circumstances of the two classes of persons, the Legislature may be justified in treating them differently. The state enjoys a wide range of discretion in distinguishing, selecting, and

> classifying, and it is sufficient if a classification is practical and not palpably arbitrary. *Orient Ins Co* v *Daggs*, 172 US 557; 19 S Ct 281; 43 L Ed 552 (1899)." 402 Mich 554, 662.

In deference to the legislative wisdom, we made clear that in the application of these tests, "it is axiomatic that the challenged legislative judgment is accorded a presumption of constitutionality". 402 Mich 554, 613.

Recognizing that the presumption of constitutionality to be accorded judgments of the Legislature is rebuttable in nature, we indicated that:

> "a party challenging the legislative judgment may attack its constitutionality in terms of purely legal arguments (if the legislative judgment is so arbitrary and irrational as to render the legislation unconstitutional on its face) * * *." 402 Mich 554, 614.

Cognizant of the bifurcated analytic approach and general principles established in *Shavers*, our task in deciding the constitutional questions presented herein must be as follows:

> In considering plaintiffs' due process and equal protection challenges to the statutory scheme under § 3109(1), this Court must (i) determine whether plaintiffs have overcome the "presumption of constitutionality" by establishing through legal argument or otherwise that the evil identified by the statutory scheme under § 3109(1) is entirely without basis; and (ii) determine whether either the statutory scheme or classification matrix drawn under § 3109(1) is reasonably related to the legislative purpose of correcting the evil that is rationally identified.

We are of the opinion that while the first prong of this analysis has been satisfied, the statutory scheme is deficient on its face as to the second prong, thereby rendering § 3109(1) unconstitutional on its face at least insofar as the subtraction of federal Social Security survivors' benefits is concerned.

V.

DISCUSSION: LEGISLATIVE PURPOSE AND STATUTORY CLASSIFICATION

As indicated, *supra*, in testing both equal protection and due process attacks to statutory schemes under the No-Fault Act, the Court must first determine whether the challenged scheme has a valid legislative purpose.

In *Shavers* v *Attorney General, supra*, we opined that "[t]he goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses". 402 Mich 554, 578-579.[12] Consistent with this legislative objective was the apparent legislative determination to either reduce or contain presently rising levels of premium costs borne by all insureds.

The Court of Appeals reasoning in this case, handed down prior to our decision in *Shavers*, implicitly recognized this comprehensive legislative judgment. Judge T. M. Burns, writing for the majority of that court, further discerned the purpose of § 3109(1) in the following manner:

> "Presumably, the purpose of § 3109(1) is to reduce the overall cost of the no-fault program by eliminating duplicative recovery. If the insurer has to pay less, he can charge less. As

> recognized in *Shavers* [65 Mich App 355; 237 NW2d 325 (1975)], the reduction of the cost of insurance is a proper basis for classification, and prohibitive cost was a problem that needed solution." 70 Mich App 487, 495.

We are satisfied that the legislative objective sought to be achieved by the promulgation of the disputed statutory scheme encompasses either the objectives of duplicative benefit elimination or premium cost reduction, or both. This characterization of the disputed scheme's purpose finds support in both the legislative history of § 3109(1)[13] and the majority of those cases considering the constitutionality of this scheme.[14]

Considering the comprehensive legislative objective sought to be effectuated by the promulgation of this Act, we find the purpose of the statutory scheme under consideration to be both an exercise of permissible legislative judgment and rationally based.[15] In deference to this legislative judgment, we must conclude that the first requirement of the traditional equal protection test has been fulfilled; plaintiffs have not overcome the presumption that the challenged statutory scheme has a valid legislative purpose.

Having so concluded, as did the Court of Appeals, we must now address ourselves to whether the challenged classifications and means engineered under the § 3109(1) statutory scheme are reasonably related to this legitimate governmental purpose. We conclude, as did the jurists in the analogous principal cases of *Fox* v *Employment Security Comm*, 379 Mich 579; 153 NW2d 644 (1967), and *Bowser* v *Jacobs*, 36 Mich App 320; 194 NW2d 110 (1971), that the classification matrix drawn by the Legislature is without the force of requisite logic

and is therefore both unconstitutionally arbitrary and discriminatory where contributions have been made by the insured for those governmental benefits, including federal Social Security survivors' benefits, sought to be set-off by § 3109(1). This conclusion is occasioned whether we perceive the purpose of the statutory scheme to be one of duplicative benefit elimination, or premium cost reduction.[16]

VI.

EQUAL PROTECTION CHALLENGE

The gravamen of plaintiffs' equal protection challenge to § 3109(1) is that, while the purpose of the statutory scheme may be a permissible one, there exist no naturally distinguishable characteristics relevant to the permissible legislative judgment which rationally justify the disparate treatment afforded these two classes. The only apparent distinction between these classes — the source of the collateral benefits — does not constitutionally justify the disparate treatment afforded those no-fault insureds receiving collateral governmental benefits and those no-fault insureds receiving collateral private insurance benefits.

On the contrary, the identity of class characteristics is patent. Both classes have received the same premium cost reduction, if any, both classes have paid the same premium dollar for identical no-fault coverage, and both, at least in the case of Social Security survivors' benefits, have made monetary contributions to secure the coverage authorizing both the governmental and private benefits. Further, plaintiffs cite persuasive legal authority in support of their contentions.

Defendants, on the other hand, allege that there exist distinguishing characteristics between governmental fund coverage and private insurance fund coverage which justify the disparate treatment afforded these two classes of no-fault recipients in furtherance of what defendant perceives to be the legislative objective of the No-Fault Act, *i.e.*, the structuring of no-fault insurance as a secondary rather than as a primary source of compensation.[17] Additionally, defendant attempts to distinguish and rebut plaintiffs' legal authority on the basis of *Richardson* v *Belcher*, 404 US 78; 92 S Ct 254; 30 L Ed 2d 231 (1971), attempts to factually distinguish mandatory governmental and voluntary private insurance benefits,[18] and alleges that the amendment of the No-Fault Act with the addition of § 3109a operates to cure the disputed statutory scheme of any constitutional violations otherwise arguably involved.[19]

In the instant case, we are not called upon to consider whether the absence of monetary contribution by an insured to a governmental insurance system would have a favorable impact on the legislative justification for separate classification. Rather, we are here confronted with the Legislature's attempt to set off those benefits emanating from a contributory governmental scheme. Especially because of this significant distinction, we are persuaded by plaintiffs' arguments that § 3109(1) is arbitrary and discriminatory insofar as it treats similarly situated no-fault insureds differently through its creation of two distinct classes solely upon the *source* from which the extra compensation is paid.

In view of the facts here that (i) both classes of no-fault insureds pay the same premium dollar for identical maximum personal protection no-fault coverage, (ii) both classes have received a common

premium cost reduction, if any, and (iii) both classes have monetarily contributed to secure the coverage authorizing both governmental and private benefits, we must find this statutory scheme facially violative of traditional equal protection mandates. Our conclusions in this regard are supported by analogous Michigan precedent: *Fox* v *Employment Security Comm*, 379 Mich 579; 153 NW2d 644 (1967); *Bowser* v *Jacobs*, 36 Mich App 320; 194 NW2d 110 (1971).[20]

A. Duplicative Benefit Elimination

If the legislative purpose of the statutory scheme before us is considered to involve the elimination of duplicative recovery, it is apparent that this permissible purpose is neither practically nor constitutionally realized by the § 3109(1) classification matrix as the distinction in classes is based solely on the source from which the collateral compensation is paid.[21] Section 3109(1) irrationally permits the retention of duplicative no-fault and private insurance benefits by that class which has directly engaged such collateral, private insurance. Yet, it concurrently mandates the reduction of insurer-paid no-fault benefits by the amount of benefits likewise directly paid for by the no-fault insured yet fortuitously received under the auspices of a governmental program. We cannot sanction this irrational class differentiation.

This finding of unconstitutionally disparate classification is further emphasized when one notes that § 3109a, MCLA 500.3109a; MSA 24.13109(1), provides for an optional set-off of private, collateral insurance benefits at the election of the insured, while § 3109(1) mandates such a set-off whether the governmental benefit recipient desires such a subtraction or not.

There is no logic to support this difference in an attempt to eliminate duplicative recovery.[22]

B. Premium Cost Reduction

Similarly, pursuant to the classifications drawn by the Legislature in enacting § 3109(1), all Michigan motorists pay the same uniform premium rate for no-fault coverage but all do not receive the same benefits. It is urged by defendant that such classifications are permissible means for achieving the lowering of premium rates. We do not agree as § 3109(1) focuses the burden of premium cost reduction on governmental benefit recipients alone. That class is confronted with a set-off while similarly situated private insureds who benefit from this premium reduction are not. This conclusion obtains whether we review § 3109(1) alone or in conjunction with § 3109a.

Section 3109a, MCL 500.3109a; MSA 24.13109(1), provides in relevant part:

> "An insurer providing personal protection insurance benefits shall offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured.* * *"

The effect of this section is to permit a no-fault insured who has engaged collateral, private insurance to receive a reduction in premium rates if that insured has elected a set-off of private, collateral benefit amounts. Section 3109(1), on the other hand, compels an insured to pay the full premium rate while concurrently requiring acquiescence to a mandatory set-off of governmental benefits for which the insured has paid.

In a real sense, both classes of insureds have paid for their collateral benefits whatever form those benefits have assumed. Yet, those who have engaged private, collateral benefits are permitted to recoup some of their collateral benefit costs through an appropriate premium reduction pursuant to § 3109a while those who receive governmental benefits are denied a similar recoupment of some of their out-of-pocket collateral benefit costs through an equally appropriate premium reduction. In effect, private collateral benefit no-fault insureds are disproportionately permitted larger no-fault benefits for their elected full or reduced premium rate payment than are similarly situated governmental benefit recipient-insureds at the mandatory full premium rate.[23]

Further, proceeding from an analysis of § 3109(1) alone, we are similarly convinced that the burden of effectuating the permissible premium cost reduction objective unconstitutionally rests solely upon the governmental benefit class of no-fault insureds. Ur like the collateral private insured class, the governmental recipient insured class is first compelled to purchase no-fault insurance, denied full no-fault coverage on claims compensable by governmental programs ostensibly for the purpose of reducing premiums, and is then denied the full benefit of the savings in premiums while the similarly situated private benefit class is not. In essence, this scheme operates both arbitrarily and discriminately to compel those insureds entitled to both government and no-fault benefits to subsidize premium savings for the greater class of all insureds including those entitled to receive and hold private insurance benefits.[24]

C. *Equal Protection Case Analysis*

We find support for our conclusion of facial unconstitutionality in the case law as developed by the courts of this state. Indeed, both this Court and the Court of Appeals have earlier been faced with equal protection challenges to analogous governmental set-off schemes; these challenges were presented in both *Fox* v *Employment Security Comm*, 379 Mich 579; 153 NW2d 644 (1967), and *Bowser* v *Jacobs*, 36 Mich App 320; 194 NW2d 110 (1971).

In *Fox*, weekly unemployment benefits were statutorily denied to those employees receiving total permanent, partial permanent, or temporary disability worker's compensation benefits. Recipients of worker's death benefits, "specific loss" benefits, and those employees who elected to accept a "lump sum" worker's compensation award, however, were statutorily permitted to receive weekly unemployment compensation.

Justice T. M. Kavanagh, writing for the majority, opined that the object of the disputed statutory scheme was to preclude the possibility of benefit duplication; this object was identified by the Court as a permissible legislative purpose. The distinction drawn by the Legislature between the two classes of potential weekly unemployment compensation recipients on the basis of a worker's eligibility for either permanent or temporary compensation as opposed to death benefits, "specific loss" benefits, and "lump sum" benefits, however, was held to be an impermissible, arbitrary classification scheme. This was so, the Court opined, because under

the statutory scheme certain workers were permitted to obtain unemployment benefits while others similarly situated were not. Citing *People* v *Chapman*, 301 Mich 584; 4 NW2d 18 (1942), which quoted from *Haynes* v *Lapeer Circuit Judge*, 201 Mich 138; 166 NW 938 (1918), the Court stated:

> " ' "Legislation which, in carrying out a public purpose for the common good, is limited by reasonable and justifiable differentiation to a distinct type or class of persons is not for that reason unconstitutional because class legislation, if germane to the object of the enactment and made uniform in its operation upon all persons of the class to which it naturally applies; but if it fails to include and affect alike all persons of the same class, and extends immunities or privileges to one portion and denies them to others of like kind, by unreasonable or arbitrary subclassification, it comes within the constitutional prohibition against class legislation." ' " 379 Mich 579, 589.

Under the auspices of the "traditional" equal protection test, the Court held that the disputed statutory classification scheme denied plaintiffs equal protection despite its attempt to effectuate a permissible legislative objective of duplicative benefit elimination.

While we are cognizant that *Fox* is not a direct analogue of the present action, we believe it persuasively offers support for the proposition that the classifications drawn here are violative of equal protection. In fact, we are of the opinion that the *Fox* Court went further than we are presently required to proceed in finding a governmental set-off scheme constitutionally infirm in that neither the

unemployment nor worker's compensation beneficiaries made any financial contribution for their benefit rights whereas in the instant case the beneficiaries made contributions for all benefit rights.

Further support for our ruling of facial unconstitutionality is found in the closely analogous case of *Bowser* v *Jacobs*, 36 Mich App 320; 194 NW2d 110 (1971) (now Justice Levin, dissenting and recommending remand for further findings of fact). In *Bowser*, the Court of Appeals considered the equal protection viability of a statutory scheme under the Motor Vehicle Accident Claims Act. The disputed scheme operated to totally bar those employees entitled to worker's compensation from applying for benefits under that Act. Those claimants similarly situated, but who had nonetheless secured voluntary collateral, private insurance, however, were permitted recourse against the fund. The majority agreed with the plaintiffs' concern that the classification was violative of "traditional" equal protection mandates.[25] Writing for the Court, Chief Judge Lesinski stated:

> "The legislative aim of this social legislation * * * is to compensate those injured by uninsured tortfeasors who would otherwise have had no source of recovery. But, as we have seen, some persons who have available avenues of recovery are permitted to reach the Fund but injured employees are not. We are constrained to agree that the legislature has arbitrarily carved out this class from those who have recourse to the Fund. This classification is one made without the force of compelling logic; we find it unconstitutionally discriminatory." 36 Mich App 320, 328.

Defendant characterizes *Bowser* as inapt on the ground that the statutory scheme presently under consideration merely mandates a set-off in recovery while the *Bowser* statutory scheme required a total bar to recovery. We do not find this distinction persuasive, especially in view of the fact that in both *Bowser* and the case at bar the concern is one of statutory classification rather than the aggregate amount of an insured's recovery. We find the basis of the *Bowser* court's reasoning appropriate for consideration in the matter before us.

Defendant's principal rebuttal to the Court of Appeals ruling of unconstitutionality rests upon the decision of the United States Supreme Court in *Richardson* v *Belcher*, 404 US 78; 92 S Ct 254; 30 L Ed 2d 231 (1971) (Justices Douglas, Marshall and Brennan dissenting). We find this arguable, but distinguishable and not persuasive.

The facts presented in *Richardson* required the United States Supreme Court to consider a "traditional" equal protection challenge to § 224 of the Social Security Act. The disputed statutory scheme required the set-off of state and federal worker's compensation benefits against federal Social Security disability benefits. Those similarly situated but entitled to voluntary, private benefits, however, were not required to maintain a similar set-off. The Supreme Court, in a 4 to 3 decision, ruled that the difference in treatment accorded these two classes was not constitutionally infirm considering the peculiar legitimate legislative purpose sought to be furthered by the scheme, *i.e.*, the affirmance and encouragement of state worker's compensation schemes.

Justice Stewart writing for the majority in *Richardson* stated:

> "It is self-evident that the offset reflected a judgment by Congress that the workmen's compensation and disability insurance programs in certain instances served a common purpose, and that the workmen's compensation programs should take precedence in the area of overlap.
>
> * * *
>
> "* * * The original purpose of state workmen's compensation laws was to satisfy a need inadequately met by private insurance or tort claim awards. Congress could rationally conclude that this need should continue to be met primarily by the States, and that a federal program that began to duplicate the efforts of the States might lead to the gradual weakening or atrophy of the state programs." 404 US 78, 82-84.

We are convinced that *Richardson* is manifestly distinguishable from the case at bar.

First, the United States Supreme Court's ruling specifically relied on the federal-state relationship and the congressional desire not to encroach upon a state program. That policy is obviously not present in the instant case.

Second, factually the two situations under comparison markedly differ. This is so in two pivotal respects.

The first significant factual distinction centers on the fact that *Richardson* concerned the set-off relationship of two non-beneficiary contributory systems from which

the insured would benefit gratuitously, whereas the instant case concerns the set-off relationship of two beneficiary contributory systems. Unlike the situation posed in *Richardson*, this Court is not required to rule on a legislative classificatory attempt to eliminate redundant, free transfer payments; rather, we are faced with a manifestly distinguishable attempt to set off insured-financed governmental benefits against insured-financed private no-fault coverage.

The second significant factual distinction involves the circumstance that the *Richardson* scheme sought to set off a disability benefit against a disability benefit, whereas the scheme under review seeks to set off a longevity benefit against a disability benefit. We find this dissimilarity compelling.

Third, we find *Richardson* distinguishable in terms of the legislative purposes sought to be accomplished by the statutory schemes engineered by the United States Congress and the Michigan Legislature. Reduced to their common denominator, both schemes have as an apparent legitimate purpose the elimination of duplicative recovery. This elimination was sought to be achieved by these two legislative bodies, however, through two entirely different vehicles. Indeed, in *Richardson*, Congress enacted a set-off provision as a vehicle to reduce the federal government's risk on its own federal, governmental fund. Here, unlike *Richardson*, the Michigan Legislature has enacted a set-off as a vehicle to reduce the private insurance industry's risk on a private insurance fund. In essence, the § 3109(1) scheme operates to either partially or completely discharge *private* contractual, no-fault obligations while the *Richardson* scheme operated to discharge *public* obligations created and controlled by Congress pursuant to its general welfare powers.

On the basis of the foregoing analysis of *Richardson*, we are persuaded that the majority's reasoning and holding therein is not dispositive of the case before us as suggested by defendant.[26] We are further persuaded that the conceptual analysis offered in both *Fox* and *Bowser* is both appropriate for our present consideration and supportive of our finding of facial unconstitutionality.

VII.

DUE PROCESS CHALLENGE

Plaintiffs additionally contend that the § 3109(1) statutory scheme is facially unconstitutional as it confiscates property in the form of personally financed premium payments without due process of law. In support of this contention, plaintiffs forward essentially the same analysis as provided in their equal protection challenge to § 3109(1). Defendant similarly rests upon the same analysis it proffered to rebut plaintiffs' equal protection challenges.

We have consistently opined that the over-all objective of the No-Fault Act is to adequately, assuredly, and promptly compensate victims of automobile accidents for certain economic losses. We have likewise determined that the statutory scheme engineered by § 3109(1) has as its permissible purpose either the elimination of duplicative recovery or the reduction of premium costs for all insureds.

It is beyond peradventure that payment of personal protection insurance benefits as well as the payment of governmental benefits under the no-fault scheme are triggered by an injury arising from a compensable automobile accident and resulting in economic loss to

the insured. Yet, the broad statutory language of § 3109(1) irrationally permits the set-off of non-accident as well as accident related governmental benefits.

Indeed, the unqualified, overbroad language of § 3109(1) indicates the absurd result that not only may the insurer subtract insured subsidized accident-related Social Security benefits as here, but the insurer may also set off *e.g.*, federal, state, municipal and employee pension and disability plans, veterans' benefits, and other non-automobile casualty related benefits paid from a governmental fund and financed by the recipient insured. No doubt, were we to hold this section constitutional, we could envision an insurer setting-off an insured's governmental pension benefits awarded because of the insured's employment longevity, against the insurer's no-fault liability for injury occasioned in an automobile accident.

It is clear from the above example that the language of this scheme is unconstitutionally overbroad and devoid of means rationally related to an otherwise legitimate legislative purpose.

VIII.

CONCLUSION

We find that the elimination of duplicative benefits and the maintenance or reduction of premium costs are permissible exercises of the legislative judgment. We are not persuaded, however, that either the classifications drawn or the means selected by the Legislature to effectuate this judgment through the enactment of § 3109(1) reasonably relate to these otherwise legitimate governmental purposes.

Accordingly, we find the statutory scheme of § 3109(1) to facially deny plaintiffs both due process and equal protection of the laws.

Having found § 3109(1) facially unconstitutional, we likewise find the contract provision invalid as offensive to public policy. See, *e.g.*, *State Farm Mutual Automobile Ins Co* v *Shelly*, 394 Mich 448; 231 NW2d 641 (1975).

Although the Court of Appeals found § 3109(1) to be of no effect as of the date of its enactment, we hold that in the interests of justice our declaration of unconstitutionality must be given only limited retroactive effect. We, therefore, hold the ruling announced today to be applicable to: (i) the instant case and all lower court cases presently pending which have raised this issue but in which a decision has not been rendered; (ii) all appropriate future cases in which this section is disputed subsequent to the date of this opinion; (iii) those cases in which a retrial is to occur after the date of this opinion because of remand on any other issue where the § 3109(1) set-off issue has been raised; and (iv) those cases pending on appeal or eligible for appeal after the date of this opinion in which this issue has been adequately preserved.

We affirm the Court of Appeals finding of unconstitutionality and order entry of judgment consistent with this opinion. No costs, a public question being involved.

/s/ G Mennen Williams

/s/ John W. Fitzgerald

/s/ Blair Moody, Jr.

OPINION FOOTNOTES

---

[1] US Const, Am XIV; Const 1963, art 1, § 2 (equal protection); Const 1963, art 1, § 17 (due process).

---

[2] As indicated *infra*, plaintiffs must bear the burden of rebutting the presumption of a statute's constitutionality. That task may be accomplished by one or both of two methods: plaintiffs may either forward persuasive legal arguments indicating that the legislative judgment culminating in the enactment of the statutory scheme under § 3109(1) is unconstitutional on its face, see *Borden's Farm Products Co, Inc* v *Baldwin*, 293 US 194; 55 S Ct 187; 79 L Ed 281 (1934); *Pinnick* v *Cleary*, 360 Mass 1; 271 NE2d 592 (1971) (Tauro, C. J., concurring), or plaintiffs may offer facts justifying a judicial declaration that the scheme is equally unconstitutional, see *Borden's Farm Products Co, Inc* v *Baldwin*, 293 US 194; 55 S Ct 187; 79 L Ed 281 (1934); *People* v *Poucher*, 398 Mich 316; 247 NW2d 798 (1976). While we have expressed our preference for the latter offer in our consideration of certain constitutional attacks to other disputed no-fault statutory schemes in *Shavers* v *Attorney General*, 402 Mich 554; 267 NW2d 72 (1978), we have not expressed that preference in absolute terms. Indeed, we are of the opinion that in cases such as the one at bar presenting a facially unconstitutional no-fault statutory scheme, the presentation of compelling legal arguments is alone sufficient to support a judicial declaration of unconstitutionality.

---

[3] This set-off is made against an insured's § 3108 no-fault personal protection benefits.

---

[4] Compare MCL 500.3109a; MSA 24.13109(1) which provides in pertinent part:

> "An insurer providing personal protection insurance benefits shall offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured. * * *"

---

[5] In *Shavers, supra*, this Court held that plaintiffs therein lacked standing under GCR 1963, 521.1 to seek declaratory relief regarding § 3109(1) because "[t]here is no proof in the record that any plaintiff had a claim for an injury which had been denied or reduced [in amount pursuant to § 3109(1)]". 402 Mich 554, 592, fn 12. Justice Levin similarly addressed this principle in *Advisory Opinion re: Constitutionality of 1972 PA 294*, 389 Mich 441, 484; 208 NW2d 469 (1973):

> "It is not properly within our function to hypothesize particularized claims or to set up, speculatively, strawmen classes of persons who might claim to be disadvantaged in various ways by the classifications and provisions of the Act."

We clearly have no such problem here. It is undisputed that plaintiffs herein "[have] a claim for an injury which [has] been * * * reduced [in amount pursuant to § 3109(1)]". The Social Security Act provides for the payment of Social Security survivors' benefits to four categories of individuals if their decedent was statutorily "insured". 42 USC 402 *et seq*. While the pleadings presented to this Court for review do not indicate under which section of the Social Security Act plaintiffs have secured their survivors' benefits, we can assume without conclusively finding that plaintiffs have been provided benefits pursuant to 42 USC 402(g) and 42 USC 402(e).

---

[6] It is undisputed that plaintiffs herein, the statutory dependents of decedent no-fault insured, did not personally contribute to the Social Security fund authorizing the survivors' benefits to which they are entitled. Rather, plaintiffs collected this governmental benefit through their deceased father and husband against whom the wage deduction was levied. Under this set of facts, we are of the opinion that plaintiffs should be considered as having made the Social Security fund contribution in the same manner as we would have considered the no-fault insured decedent's contributions had he survived the automobile accident. Obviously, there is no difference in principle, insofar as contributions are concerned, between the present instance and the instance where the actual payor has not been killed in an automobile accident but personally institutes suit for disability benefits personally financed. Additionally, plaintiffs herein suffer further disparate treatment through the operation of this set-off scheme when compared with survivors of a privately insured whose benefits would not similarly be subject to set-off.

[7] *O'Donnell* v *State Farm Mutual Automobile Ins Co*, 70 Mich App 487; 245 NW2d 801 (1976) (Bashara, P.J., dissenting and recommending remand).

[8] Section 3110 of 1972 PA 294 provides:

> "(1) The following persons are conclusively presumed to be dependents of a deceased person:
>
> "(a) A wife is dependent on a husband with whom she lives at the time of his death.
>
> "(b) A husband is dependent on a wife with whom he lives at the time of her death.
>
> (c) A child while under the age of 18 years, or over that age but physically or mentally incapacitated from earning, is dependent on the parent with whom he lives or from whom he receives support regularly at the time of the death of the parent." MCL 500.3110; MSA 24.13110.

[9] Section 3108 of the No-Fault Act provides:

> "Personal protection insurance benefits are payable for a survivors' loss which consists of a loss, after the date on which the deceased died, of contributions of tangible things of economic value, not including services, that dependents of the deceased at the time of his death would have received for support during their dependency from the deceased if he had not suffered the accidental bodily injury causing death and expenses, not exceeding $20.00 per day, reasonably incurred by these dependents during their dependency and after the date on which the deceased died in obtaining ordinary and necessary services in lieu of those that the deceased would have performed for their benefit if he had not suffered the injury causing death. The benefits payable for survivors' loss in connection with the death of a person in a single 30-day period shall not exceed $1,000.00 and is not payable beyond the first 3 years after the date of the accident." MCL 500.3108; MSA 24.13108.

[10] Appellant's Appendix, p 14a.

[11] Appellant's Appendix, p 15a.

[12] As to the Act's personal injury protection scheme, we elaborated that its "comprehensive and expeditious benefit system", was reasonably related to curing certain pronounced deficiencies of the tort liability system of recovery, including evidence that: "minor injuries were overcompensated, serious injuries were undercompensated, long payment delays were commonplace, the court system was overburdened, and those with low income and little education suffered discrimination". 402 Mich 554, 579.

[13] Michigan's No-Fault Insurance Act was signed into law by Governor Milliken on October 31, 1972. 3 Mich Senate J (1972) 2032. After two years of substantial alteration and modification undertaken by both the Michigan House of Representatives and Senate, § 3109(1) as it presently appears was adopted in that enactment.

In April of 1971, four House Bills were introduced detailing a proposed no-fault scheme of automobile insurance. 1 Mich House J (1971) 783-784. None of these Bills, however, specifically provided for governmental benefit set-off. It was in response to the absence of such a provision that then-acting Commissioner of Insurance Van Hooser voiced his concern to Governor Milliken that these House Bills adversely tended to increase remedial duplication and overlap between automobile insurance benefits and other benefit programs (*e.g.*, social security and medicare) receivable by an insured. In an attempt to remedy this apparently undesirable result, the Commissioner opined that the general language, "shall be payable without regard to entitlement to any other program providing wage continuation benefits", should be deleted from the bill's format. Letter from Russell E. Van Hooser, Michigan Commissioner of Insurance, to Governor Milliken (June 4, 1971) concerning analysis of House Bills 4734, 4735, 4736 and 4737, p 3 reproduced in Defendant's Exhibit No. 212, Joint Appendix submitted to this Court

(fn. 13 cont'd.)

in *Shavers* v *Attorney General*. These House Bills subsequently died in committee with no action having been taken on the Commissioner's recommendation.

On April 26, 1971, the Michigan Senate introduced Senate Bill 520. 1 Mich Senate J (1971) 663. Unlike the above House drafts, § 3520, subds (A) and (B) of that bill provided for an expansive governmental benefit set-off scheme. Indeed, this bill mandated the subtraction of both public and private benefits — with the exception of Social Security benefits — from the amount otherwise payable by an insurer. Section 3520 of Senate Bill 520 provided in pertinent part:

> "Sec. 3520 In calculating Net Loss:
>
> "(A) Except as otherwise provided in this chapter, all benefits and advantages a person receives or is entitled to receive because of an injury, from sources other than complete and added protection insurance are subtracted from loss." Mich Senate Bill 520 (1971).

Commissioner Van Hooser summarized the arguments for this draft legislation, stating: "It would reduce the cost of automobile insurance. * * * It would eliminate duplication of benefits (and the resulting double premiums) by coordinating benefits from automobile insurance with all other benefits". Letter from Russell E. Van Hooser, Michigan Commissioner of Insurance to Governor Milliken (June 4, 1971), p 2 concerning analysis of Senate Bill 520 reproduced in Defendant's Exhibit No. 212, Joint Appendix submitted to this Court in *Shavers* v *Attorney General*.

Approximately two months after the introduction of Senate Bill 520, another bill was introduced in the Senate which directed a contrary set-off result to that expressed in Senate Bill 520. Section 9 of Senate Bill 782, 1 Mich Senate J (1971) 1000-1001, provided in pertinent part:

> "Sec. 9(1) The amount of disability and survivor benefits a claimant recovers or is entitled to recover under the social security act, United States Code, title 42, sections 301 et seq., because of accidental bodily injury shall be subtracted from the personal protection insurance benefits otherwise payable for the injury." Mich Senate Bill 782 (1971).

Unlike Senate Bill 520, this set-off provision mandated payment to the insured of both personal protection insurance benefits as well as

(fn. 13 cont'd.)

other private and public benefits with the exception of social security benefits.

Commissioner Van Hooser noted that while Senate Bill 782 "would assure prompt and adequate compensation of persons injured in auto accidents in this state for medical expenses, rehabilitation expenses, wage loss and survivor's loss", it would likewise encourage an increase in the cost of auto insurance as it failed to eliminate duplication of benefits. Letter from Commissioner Van Hooser to Governor Milliken (June 4, 1971), p 2 concerning Senate Bill 782 reproduced in Defendant's Exhibit No. 212 in *Shavers v Attorney General*. Accordingly, the Commissioner proposed an amendment to Senate Bill 782 which he determined would reduce the cost of auto insurance. Letter, p 4. The Van Hooser amendment substantially mirrored the final version of § 3109(1) as adopted.

Admittedly addressed only to Governor Milliken, Commissioner Van Hooser's comments make clear that the purpose of the § 3109(1) statutory scheme was framed in terms of maintaining or reducing premium costs for all insureds through the elimination of duplicative benefits recovery. We accept the Commissioner's comments as indicative of, if not substantially mirroring, the legislative judgment in this regard. See, generally, Note, O'Donnell v State Farm Mutual Insurance Co: *A Judicial Attempt to Amend Michigan's No-Fault Act*, 1977 DCL Rev 187.

---

[14] *Greene* v *State Farm Mutual Automobile Ins Co*, 83 Mich App 505; 268 NW2d 703 (1978); *Hawkins* v *Auto-Owners Ins Co*, 83 Mich App 225; 268 NW2d 534 (1978); *Smart* v *Citizens Mutual Ins Co*, 83 Mich App 30; 268 NW2d 273 (1978); *Mielke* v *Michigan Millers Mutual Ins Co*, 82 Mich App 721; 267 NW2d 165 (1978); *Pollock* v *Frankenmuth Mutual Ins Co*, 79 Mich App 218; 261 NW2d 554 (1977); *Wysocki* v *Detroit Automobile Inter-Ins Exchange*, 77 Mich App 565; 258 NW2d 561 (1977).

---

[15] As Justice Levin posited for this Court in *Manistee Bank & Trust Co* v *McGowan*, 394 Mich 655, 680; 232 NW2d 636 (1975);

> "Courts should proceed cautiously and should defer to legislative judgments which are reasonable. The Legislature must be free to experiment without being required to attain 'mathematical nicety' in its formulation of remedies to social and economic problems."

---

[16] In its brief, defendant asserts yet a third purpose allegedly justifying the classification matrix employed by § 3109(1). Proceeding from the premise that the No-Fault Act was enacted to "achieve full compensation for all economic losses so defined and limited by the Legislature", Appellant's Brief, p 17, defendant concludes that the evident purpose of § 3109(1) was designed (i) to "assure that no more and no less than actual economic loss is recovered from any source * * * and (ii) as "[a]n ancillary effect * * * to reduce no-fault insurance carriers' exposure and, consequently, to keep the cost of no fault coverage within manageable limits". Appellant's Brief, p 18. The primary thrust of defendant's argument in this regard, therefore, is that the classifications drawn by § 3109(1) rationally promote the alleged legitimate purpose of the statutory scheme under consideration: the legislatively mandated provision of secondary rather than primary insurance coverage of economic loss. We are of the opinion that this purpose asserted by defendant was not embraced by the Legislature in view of the fact that the "subtractions" mandated by § 3109(1) include benefits enjoyed prior to the automobile casualty. Since these benefits were enjoyed wholly apart from the casualty compensable by no-fault, they could not be considered a component of the compensable economic loss resulting from the automobile casualty.

We have reviewed the legislative development of the statutory scheme under consideration as well as the No-Fault Act as a whole in our *Shavers* decision and can nowhere find support for defendant's assertion of this legislative purpose. Unpersuaded by defendant's particular characterization of the disputed scheme's purpose, we need not further address defendant's contentions in this regard.

---

[17] Actually, it is difficult to conceive of no-fault benefits as "secondary". Since all drivers in this state are required to be covered by no-fault insurance, and since a significant fraction of these drivers are either not members of the work force from which most governmental benefits arise, or have not been in the work force long enough to be so entitled, no-fault insurance is most frequently a primary rather than a secondary source of compensation.

---

[18] Defendant cites two principal characteristics which defendant alleges distinguish governmental benefits from private insurance benefits and thereby justify the "modest difference in treatment between such benefits necessary to accomplish the Legislature's objective [of making no-fault insurance a secondary, rather than a primary source for compensating auto crash victims for economic loss]". Appellant's Brief, 32. In brief, these two characteristics are: (i) governmental benefit programs are universal and involuntary whereas private insurance programs are not; and (ii) benefits received from governmental programs are uniform and readily determinable while private insurance benefits are not. Appellant's Brief, 31-38.

Defendant's alleged distinctions justifying disparate treatment are unpersuasive. Indeed, governmental benefits are not necessarily universal as contended by defendant. For example, all no-fault insureds are not necessarily entitled to the receipt of either military benefits or even Social Security benefits although some no-fault insureds are so entitled. Further, we have found that the legislative purpose to be furthered by the disputed statutory scheme is different from that stated by defendant; defendant's distinctions are thereby rendered inapposite.

---

[19] Section 3109a, MCL 500.3109a; MSA 24.13109(1) provides in pertinent part:

> "An insurer providing personal protection insurance benefits shall offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured. * * *"

This section of the No-Fault Act provides for an *optional* set-off of private, collateral insurance benefits at the election of the insured. In contrast, § 3109(1) provides for a *mandatory* set-off of governmental benefits whether the insured desires such a subtraction or not, and is significantly devoid of any similar provision such as *"at appropriately reduced premium rates"*.

(fn. 19 cont'd.)

Defendant asserts that the injection of § 3109a into the composition of the general set-off scheme alleviates any constitutional infirmity of that scheme. Defendant's principal argument in this regard appears to center on the notion that, read in conjunction, §§ 3109(1) and 3109a operate to treat all no-fault insureds in an identical manner as both governmental and private, collateral benefits are confronted with a set-off. As stated by defendant in its brief at page 27:

> "* * * The only difference between government benefits and benefits from other private insurance is that government benefits are required to be subtracted from no-fault benefits while the insured has the option of electing to deduct or exclude his other private health and accident coverages or, if he be willing to bear the added cost, to receive duplicative benefits from private sources."

We cannot agree with defendant that the conjunctive consideration of § 3109a cures the equal protection deficiency of the appealed scheme by creating uniformity of treatment between governmental benefit and collateral, private benefit recipients. In fact, we are of the opinion that defendant's above-quoted statement of essential similarity between the disputed classifications bears out this very opposite point.

Indeed, rather than creating similarity between the government and private, collateral benefits classes and furthering their uniform treatment, these sections read in conjunction emphasize the arbitrary and discriminatory treatment afforded the governmental recipient class of insureds. Our conclusion first finds support in the fact that while § 3109a permits the insured to *elect* a set off, § 3109(1) *requires* a set off. While in many instances a set-off may be encountered in both the governmental benefit and private, collateral benefit spheres, it is not the case that such a scenario will consistently present itself under the terms of this legislation. Thus, we are still forced to deal with that situation where private insureds, not having elected a set-off, are permitted full recovery from the no-fault insurer's fund in addition to the full receipt of collateral benefits while governmental benefit recipients, not even permitted to consider a set-off, are denied full recovery from the no fault insurer's fund as that fund is merely depleted to the extent of the above-threshold governmental benefit recovery.

(fn. 19 cont'd.)

Second, u. ormity is further dissipated by this scheme's premium reduction proviso. Section 3109a permits a reduction in full premium rates if the no-fault insured elects a set-off of collateral private benefit amounts. Section 3109(1), on the other hand, compels the insured to pay the full premium rate while concurrently acquiescing to a mandatory governmental benefit set-off. In a real sense, both classes of insureds have paid for their collateral benefits whatever form those benefits assume. Yet, those who have fortuitously engaged private, collateral benefits are permitted to recoup some of their collateral benefit costs through an appropriate premium reduction while those who have been deemed eligible for governmental assistance are denied a recoupment of some of their real out-of-pocket collateral benefit costs through an equally appropriate premium reduction. In effect, private collateral benefit insureds are permitted larger no-fault benefits for their elected full or reduced premium rate payment than are governmental benefit insureds at the mandatory full premium rate payment.

Had the Legislature chosen to offer both similarly situated classes of insureds the § 3109a set-off election with a concommitant reduction in premium rates, we might not have been compelled to consider plaintiffs' equal protection challenge. That exercise of legislative judgment, however, has not been presented for our consideration. As such, we certainly cannot agree with defendant's argument that the amendment of the No-Fault Act with the addition of § 3109a operates to breathe constitutional vitality into this otherwise expiring scheme. Rather, we are of the opinion that the juxtaposition of these provisions renders this statutory scheme facially unconstitutional in equal protection terms.

---

[20] Our holding in *Boettner* v *State Farm Mutual Ins Co*, 388 Mich 482; 201 NW2d 795 (1972), following *Blakeslee* v *Farm Bureau Mutual Ins Co*, 388 Mich 464; 201 NW2d 786 (1972), while not cited by plaintiffs, provides further support for our concern that plaintiffs have been deprived of a benefit for which they have paid and to which they would otherwise be entitled. Both *Blakeslee* and *Boettner* dealt with the stacking of automobile insurance policies prior to the advent of the No-Fault Act. Neither was decided on constitutional grounds. One issue presented in both concerned whether an insured could collect on more than one auto policy for which that insured had paid despite the fact that only one covered auto had been

(fn. 20 cont'd.)

involved in an accident. Citing our statement in *Blakeslee*, 388 Mich 464, 474, we expressed the following in *Boettner*:

> " 'It would be unconscionable to permit an insurance company offering statutorily required coverage to collect premiums for it with one hand and allow it to take the coverage away with the other by using a self-devised "other insurance" limitation.' " 388 Mich 482, 487-488.

In a real sense, the § 3109(1) statutory scheme permits an insurer to collect premiums for personal protection coverage with one hand while permitting that insurer to either completely or partially take that coverage away with the other through the guise of a governmental benefit set-off. Just as we found that practice objectionable in these stacking cases, we find them equally objectionable here.

---

[21] Actually, the benefits subject to subtraction under § 3109(1) may not even be duplicative. This point is illustrated in those instances, for example, where the governmental benefit sought to be subtracted does not arise from an automobile casualty at all, but rather arises from a longevity payment or a war-related disability.

---

[22] We note in passing that the Legislature could have constitutionally realized its otherwise permissible judgment by treating these similarly situated classes alike, mandating a set-off for both governmental and private insurance recipients. This the Legislature did not do and we therefore feel constrained to declare this classification scheme violative of equal protection.

---

[23] In view of the Legislature's apparent reluctance as expressed in § 3109a to permit a set-off of private, collateral benefits in the absence of a direct premium reduction, it might be argued that the Legislature solely mandated a set-off of governmental benefits based on the misconceived notion that governmental benefits are uniformly available to all no-fault insureds. If this erroneous conception guided the Legislature in its enactment of § 3109(1), an equally erroneous conclusion that all insureds are permissibly

(fn. 23 cont'd.)

treated similarly through the operation of § 3109(1) would indeed arise. Our disagreement with this notion is apparent. In fact, all no-fault insureds are not uniformly eligible for governmental assistance. This becomes apparent when one considers that only four narrow classes of individuals are eligible for federal Social Security survivors' benefits if their decedent was also statutorily "insured". 42 USC 402 *et seq.* Uniformity in treatment, therefore, is not championed by the § 3109(1) statutory scheme; rather, unconstitutionally disparate classification once again clearly emerges from this feigned veil of uniformity.

---

[24] See *Manistee Bank & Trust Co* v *McGowan*, 394 Mich 655; 232 NW2d 636 (1975), wherein this Court considered the equal protection viability of the Michigan Guest Passenger Act. The disputed act statutorily denied tort recovery to negligently injured, non-paying automobile passengers. As one possible purpose for the guest/non-guest classifications drawn by the Legislature, the Court analyzed the allegation that the disputed act was permissibly enacted to limit liability, reduce litigation, and thereby enable insurers to offer mandatory coverage at reduced premium rates. Applying the traditional "reasonable relation" equal protection test to the challenged classification matrix in this particular respect, Justice Levin found the statutory scheme to deny plaintiffs equal protection of the laws and stated for the majority:

> "Conceding, *arguendo*, that insurance rates are lower because there is a guest statute, lower insurance premiums do not, without more, justify an essentially arbitrary classification.
>
> "If persons injured on Thursdays or men between 50 and 60 years of age were denied recovery for ordinary negligence, there would be assurance of less litigation, fewer recoveries and the possibility of lower insurance rates. Nevertheless, all would agree that such classifications would be struck down as 'arbitrary' despite the relief afforded 'the purse of the motor owning public'.
>
> "It may be legitimate for the Legislature to intervene in the increasing costs of automobile insurance. But the means

(fn. 24 cont'd.)

> selected by the Legislature to do so must be reasonably related to the object sought to be attained. Denying guest passengers recovery for ordinary negligence is no more reasonably related to the objective of lower insurance rates than would be denying recovery to persons injured on Thursdays or men between 50 and 60 years of age.
>
> "Guest passengers as a class are not better able to bear the cost of lower premiums for the motor owning public. As a class, they are not necessarily all wealthy nor do they necessarily all have especial sources of recovery. Those who do not have other sources of recovery are forced to exhaust their own resources and may become public charges." 394 Mich 655, 677-678.

Justice Levin further opined that it was even uncertain whether governmental efforts to reduce costs and thereby protect the public purse were sufficient justification for legislative selection of a similarly situated class for disparate treatment.

Analogous to the scenario confronted by this Court in *Manistee Bank*, this case before us involves governmental benefit recipients who pay the same premium as private insureds, suffer the same losses as private insureds, and are governed by the identical no-fault benefit scheme as private insureds. Yet, when it comes time for the no-fault insurer to compensate loss, the insurer is permitted to reduce its out-of-pocket liability with respect to governmental recipients while it must fully compensate the private insured out of the same pocket, while in both instances championing the notion that this disparate treatment is undertaken in an attempt to reduce premium costs for all insureds. Much like the constitutional plight confronted by guests in *Manistee Bank*, we can perceive no rational relationship between this class segregation and premium reduction; in fact, it appears that the governmental recipient has effectively paid a higher premium for reduced recovery.

---

[25] Other jurisdictions have similarly held such statutory schemes reducing an insured's recovery by claims compensable under disability benefit laws by the amount paid out of worker's compensation funds to be invalid as contrary to public policy. See, *e.g., Allied Mutual Ins Co* v *Larriva*, 19 Ariz App 385; 507 P2d 997 (1973); *Travelers Ins Co* v *National Farmers Union Property & Casualty Co*, 252 Ark 624; 480 SW2d 585 (1972). The Court of Appeals aptly quoted the following language from the *Travelers Insurance Co* decision:

> " 'The right claimed by NFU [the insurer] would simply provide it with a windfall in the case of one covered by the workmen's compensation laws. The purpose of the Uninsured Motorist Act was to protect the insured, not the insurer.' " 70 Mich App 487, 497.

---

[26] Defendant also cites the Florida Supreme Court's decision in *Lasky* v *State Farm Ins Co*, 296 So 2d 9 (Fla, 1974), for the proposition that the present scheme is not violative of equal protection. Indeed, this was the result reached by that Court; we are not bound, however, by the holdings of other state supreme courts although such authority is frequently considered in our deliberations if well-reasoned and persuasive. We do not find *Lasky* to fall into that latter category of persuasiveness as the Florida Supreme Court's constitutional analysis of the set-off scheme presented for its review is devoid of policy discussion and lacks the citation of any legal authority.

OPINION

(State of Michigan
Supreme Court)

(Filed)

Heather Elizabeth O'Donnell, and Kathleen Anne O'Donnell, Michael Brent O'Donnell and Timothy Hugh O'Donnell, by their next friend, Heather Elizabeth O'Donnell, Plaintiffs-Appellees, v State Farm Mutual Automobile Insurance Company, an Illinois insurance corporation, Defendant-Appellant. No. 58833.

BEFORE THE ENTIRE BENCH

BLAIR MOODY, JR., J. (Concurring with Williams, J.)

I agree with the general analysis employed by Justice Williams and therefore sign his opinion. However, I reserve judgment concerning the scope of the Legislature's intent to avoid duplicative recovery and any distinction between contributive and non-contributive governmental benefits.

/s/ Blair Moody, Jr.

ORDER OF REVERSAL

(State of Michigan In the Supreme Court)

Heather Elizabeth O'Donnell and Kathleen Anne O'Donnell, Michael Brent O'Donnell and Timothy Hugh O'Donnell, by their next friend, Heather Anne O'Donnell, Plaintiffs-Appellees, v State Farm Mutual Automobile Insurance Company, an Illinois Insurance Corporation, Defendant-Appellant. 58833.

Present the Honorable Thomas Giles Kavanagh, Chief Justice, G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

This cause having been brought to this Court by appeal from the decision of the Court of Appeals and having been argued by counsel and due deliberation having been had thereon by the Court, IT IS HEREBY ORDERED that the judgment of the Court of Appeals be REVERSED. No costs are to be taxed.

CERTIFICATION

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 9th day of March in the year of our Lord one thousand nine hundred and seventy-nine.

/s/ Jacqueline B. Mosse, Deputy Clerk.

ORDER DENYING REHEARING

(State of Michigan in the Supreme Court)

Rehearing No. 469 Heather Elizabeth O'Donnell, and Kathleen Anne O'Donnell, Michael Brent O'Donnell and Timothy Hugh O'Donnell by their next friend, Heather Elizabeth O'Donnell, Plaintiffs-Appellees, v State Farm Mutual Automobile Insurance Company, an Illinois insurance corporation, Defendant-Appellant. 58833

At A Session Of The Supreme Court Of The State Of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 8th day of March in the year of our Lord one thousand nine hundred and seventy-nine.

Present the Honorable Mary S. Coleman, Chief Justice, Thomas Giles Kavanagh, G. Mennen Williams, Charles L. Levin, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices

In this cause a motion for rehearing is considered and, on order of the Court, it is hereby DENIED.

CERTIFICATION

State of Michigan—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 8th day of March in the year of our Lord one thousand nine hundred and seventy-nine.

/s/ Jacqueline B. Mosse, Deputy Clerk.

OPINION
(State of Michigan
Court of Appeals)

Heather Elizabeth O'Donnell, and Kathleen Anne O'Donnell, Michael Brent O'Donnell, and Timothy Hugh O'Donnell, by their next friend, Heather Anne O'Donnell, Plaintiffs-Appellants, v. State Farm Mutual Automobile Insurance Company, an Illinois insurance corporation, Defendant-Appellee. No. 25429

Before: Bashara, P.J., and V. J. Brennan and T. M. Burns, JJ.

T. M. BURNS, J.

Plaintiffs are the wife and children of Gary O'Donnell, who was fatally injured in an automobile accident. Mr. O'Donnell was covered by a no-fault automobile insurance policy issued by the defendant, and plaintiffs are dependents of decedent for purposes of survivor's loss benefits.

Decedent's insurance policy provided that the maximum survivor's loss benefits would not exceed $1,000 per 30-day period and that the amount payable by the insurance company would be reduced by amounts paid or payable to the survivors under state or federal law.

Plaintiffs were entitled to the maximum benefits of $1,000 per 30-day period for three years after decedent's death as permitted by the no-fault act (MCLA 500.3108; MSA 24.13108). From the monthly maximum benefits amount, however, defendant deducted $560, the sum plaintiffs received in social security benefits. This deduction was made pursuant to MCLA 500.3109(1); MSA 24.13109(1), which provides as follows:

> "Benefits provided or required to be provided under the laws of any state or the federal

> government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury."

Plaintiffs thus received $440 per month instead of the $1,000 per month figure set out in the insurance policy.

Plaintiffs filed a complaint in circuit court alleging the defendant breached the insurance contract by not paying the full $1,000 per month in benefits. Plaintiffs also sought a declaration of rights relative to the constitutionality of § 3109 of the no-fault act, which provides for the deduction of governmental benefits from the personal protection insurance benefits.

Defendant filed a motion for summary judgment, alleging that plaintiffs failed to state a claim upon which relief could be granted in that the reduction of benefits under the policy was in compliance with state law. Defendant also asserted that the policy constituted a contract between private parties and that since no state action was involved, no claim of constitutional violation could be maintained.

The trial court granted defendant's motion for summary judgment. The order stated that the complaint failed to state a cause of action for the reasons that no breach of any provision of the contract was alleged, and that defendant, in complying with the no-fault act, was not engaged in state action and, therefore, any claim that the contract itself was unconstitutional was not supported as a matter of law.

On appeal, plaintiffs argue that the trial court erred reversibly in granting summary judgment and contend that § 3109 of the no-fault act is unconstitutional.

I

It is argued that MCLA 500.3109(1); MSA 24.13109(1) violates the equal protection guarantees of the U.S. and Michigan Constitutions. This Court has recently enunciated the standard of review of legislation claimed to be so defective. See *Shavers* v *Attorney General*, 65 Mich App 355; — NW2d — (1975). *Cf. Manistee Bank & Trust Co* v *McGowan*, 394 Mich 655; 232 NW2d 636 (1975), and *Fox* v *Employment Security Commission*, 379 Mich 579; 153 NW2d 644 (1967).

Generally, legislative classification should be presumed valid, as the Legislature has broad discretion in distinguishing between different classes. "The Legislature must be free to experiment without being required to attain 'mathematical nicety' in its formulation of remedies to social and economic problems." *Manistee Bank & Trust Co* v *McGowan, supra*, at 680; 232 NW2d at ——. But legislative classification must not be arbitrary or unreasonable, it must be germane to the object of the legislation, and it must be made uniform in its operation upon all persons of the class to which it naturally applies. *Fox* v *Employment Security Commission, supra*.

> "Even under the minimum scrutiny test applied when innovative legislation is challenged on equal protection grounds, the legislation must be examined to see if its classifications are reasonable, and bear some reasonable relationship to the object of the legislation. While it is not the judiciary's task to second-guess legislative wisdom or to speculate on the possibility of more precise line-drawing by the Legislature, the decision on reasonableness cannot be avoided." *Shavers* v *Attorney General, supra* at 369; — NW2d at —.

In the *Shavers* v *Attorney General* challenge of the no-fault act, Judge Gilmore of the Wayne County Circuit Court found that § 3109(1) violates the equal protection clauses of the U.S. and Michigan Constitutions. In this Court's decision in *Shavers*, we vacated that ruling because the question was not properly justiciable. In the instant case, however, we are squarely faced with a "case of actual controversy" concerning the validity of § 3109(1).

The effect of § 3109(1) is to reduce no-fault benefits by any compensation paid under any state or federal laws, such as workmen's compensation and social security benefits. Thus, no-fault recovery is reduced by governmental collateral sources but not by any private insurance sources. The basic purpose of no-fault is to insure compensation of persons injured in automobile accidents. But the effect of § 3109(1) is to allow both no-fault benefits and private insurance benefits to those who have such private insurance, yet reduces no-fault benefits by any benefits received under a governmental program. Thus, those who have no private insurance or who cannot afford such insurance receive fewer benefits because of that fact. We find this section to be patently unreasonable and discriminatory.

Presumably, the purpose of § 3109(1) is to reduce the overall cost of the no-fault program by eliminating duplicative recovery. If the insurer has to pay less, he can charge less. As recognized in *Shavers*, the reduction of the cost of insurance is a proper basis for legislative classification and prohibitive cost was a problem that needed solution. But the fact that a problem exists does not permit arbitrary means of solving it and assuming that § 3109(1) reduces costs, such savings alone do not justify an essentially arbitrary classification. *Manistee Bank & Trust Co* v *McGowan*, *supra*, at 677; — NW2d —. *Cf. Grace* v *Howlett*, 51 Ill 2d 478; 283 NE2d 474, 478 (1972).

Section 3109(1) is very broad — it covers any collateral governmental source. No-fault systems in other states include collateral source set-off provisions, but in Illinois and Florida, for example, the set-off provisions apply only to workmen's compensation benefits. It might be argued that the latter type of set-off provision is reasonable because the workmen's compensation benefits are provided without cost to the beneficiary while private collateral source benefits are not.[1] *Cf. Grace* v *Howlett, supra,* Chief Justice Underwood, dissenting. The argument is persuasive. Section 3109(1), however, is not limited to governmental benefits provided without cost to the beneficiary. The provision requires reduction of recovery by benefits which are in a very real sense "paid for" by the "insured", such as under social security, or benefits which are in the nature of employee benefits to government employees and veterans.[2] In this case the

---

[1] This type of no-fault set-off provision (reducing no fault benefits by workmen's compensation benefits received) has been upheld by the Florida Supreme Court. *Lasky* v *State Farm Insurance Co,* 296 So 2d 9, 21 (S Ct Fla, 1974)

[2] In *Richardson* v *Belcher,* 404 US 78; 92 S Ct 254; 30 L Ed 2d 231 (1971), the U.S. Supreme Court held that § 224 of the Social Security Act, which provides for the reduction of social security disability benefits to any person also receiving workmen's compensation, is not unconstitutional as making an arbitrary discrimination between workmen's compenstion benefits and disability compensation from private insurance or from tort claim awards. Significant in *Richardson* is the Court's implicit holding that as long as there is a legitimate purpose served by a set-off provision, the provision will not be considered an invidious classification because inapplicable to recipients of private benefits.

But in the case at bar, grave doubts exist as to presence of a legitimate purpose being served by the set-off provision. It is said that the purpose of § 3109(1) is to prevent duplicative recovery of benefits. What is legitimate about that? It is asserted that the provision reduces the cost of no-fault coverage, but there has not been a hint of proof presented to this Court to so prove. Aided only by personal experience, one is inclined to conclude that the "lowered" costs are illusory.

beneficiary's no-fault benefits are reduced by governmental insurance the insured has paid for but not by private insurance for which he has paid. While this raises a fundamental due process issue (see *e.g., Flemming* v *Nestor*, 363 US 603; 80 S Ct 1367; 4 L Ed 2d 1435), the principal evil of § 3109(1) is its arbitrary application. Those who can afford private insurance to supplement no-fault benefits are permitted duplicative recovery while those who cannot afford such are denied duplicative recovery.

An analogous problem has existed under the uninsured motorist systems. Courts have held that policy exclusions reducing an insured's recovery by amounts paid out of workmen's compensation funds and disability benefit laws are invalid and against public policy. See *e.g., Allied Mutual Insurance Company* v *Larriva*, 19 Ariz App 385; 507 P2d 997 (1973).[3] In *Traveler's Insurance Co* v *National Farms Union Property & Casualty Co*, 252 Ark 624, 632; 480 SW2d 585, 591 (1972), the Court stated:

> "The right claimed by [the insurer] would simply provide it with a windfall in the case of one covered by the workmen's compensation laws. The purpose of the uninsured motorist act was to protect the insured, not the insurer."[4]

---

[3] 24 ALR 2d 1353 covers the point.

[4] The "windfall" claim may not be entirely correct as, presumably, the insurer has considered the set-off provision in setting its rates.

In *Bowser* v *Jacobs*, 36 Mich App 320; 194 NW2d 110 (1971), this Court was concerned with the constitutionality of a section of the Motor Vehicle Accident Claims Act which prevented those covered by workmen's compensation from recovering under the act. The plaintiffs were injured while in the course of their employment by uninsured motorists. They received workmen's compensation and sought recovery against the uninsured motorist fund. The secretary of state sought dismissal of the suits, relying upon a section of the act which barred recovery by an injured person if he was covered by workmen's compensation. It was demonstrated that those who had private insurance coverage were not similarly barred from recovery against the fund. This Court struck down the legislative classification as unconstitutionally discriminatory. Like the legislative classification in *Bowser*, § 3109(1) which allows personal protection benefits plus private insurance benefits to one group, but deducts from personal protection benefits anything received from a government program is arbitrary and unreasonable. We find no legitimate purpose for establishing such a distinction which arbitrarily discriminates against those who receive certain governmental benefits.

We find MCLA 500.3109(1); MSA 24.13109(1) to be unconstitutional. As such, the act is void and of no effect as of the date of enactment. *Briggs* v *Campbell, Wyant & Cannon*, 379 Mich 160; 150 NW2d 752 (1967).[5]

---

[5] See 16 CJS, Constitutional Law, § 101.

As such, the statute confers no rights upon and affords no protection to defendant. *Norton* v *Shelby County*, 118 US 425, 442; 6 S Ct 1121; 30 L Ed 178 (1886). Defendant's argument that the set-off provision in the insurance contract was the result of the bargain reached by contracting parties and thus is not affected by the validity or invalidity of § 3109(1) is egregious. The terms of the statute are mandatory. Without the "sanction" of such a statute, the contract provision is patently offensive to public policy and as such, the provision is invalid.[6]

The set-off provision in the contract is void. This cause is remanded to the trial court for entry of judgment in plaintiffs' favor. No costs.

---

[6] See, *e.g.*, *State ex rel Terbovich* v *Board of Comm'rs of Wyandotte County*, 161 Kan 700; 171 P2d 777 (1946), *State ex rel Taylor* v *Carolina Racing Association*, 241 NC 80; 84 SE2d 390 (1954).

OPINION

(State of Michigan
Court of Appeals)

Heather Elizabeth O'Donnell, and Kathleen Anne O'Donnell, Michael Brent O'Donnell, and Timothy Hugh O'Donnell, by their next friend, Heather Anne O'Donnell, Plaintiffs-Appellants, v State Farm Mutual Automobile Insurance Company, an Illinois insurance corporation, Defendant-Appellee. Docket # 25429.

Before Bashara, P.J., and V. J. Brennan and T. M. Burns, JJ.

V. J. BRENNAN, J., Concurrence with Judge T. M. Burns' Opinion.

I concur with Judge T. M. Burns' opinion.

I see no corollary as to who gets what or is getting what from various sources whether they be social security, stock dividends, insurance policies, etc., when it comes down to insurance benefits received as a result of injuries incurred from accidents.

The insurance companies successfully lobbied "no fault"[1] under the guise of necessary legislation which would inevitably greatly reduce insurance costs which they could and would pass on to the public in the form of reduced policy premiums.

I have yet to see the lower premiums but have, unfortunately, on the contrary seen increased premiums for the same coverage. These so-called savings have not been passed on to the public — and there are, no doubt, some savings present as the insurance companies, under this provision, now have picked up "Uncle Sam" and the state government as their partners in underwriting these policies.

Before "no fault" there was no reduction or subtraction in jury verdicts of amounts received from social security or other state or federal government benefits.

The provision reads:

> "Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury." MCLA 500.3109(1); MSA 24.13109(1).

---

[1] Personal and Property Protection and Residual Liability Insurance Act, MCLA 500.3101 through 500.3179; MSA 24.13101 through 24.13179.

From the way it reads one could concur that all former state and federal employees on retirement could have subtracted from their accident insurance proceeds the amount of their monthly pension.

Why the provision in the first place; is a person on social security more susceptible to accidents than one who is not? Is social security's purpose to compensate our senior citizens for prospective accident cost needs? How about a deduction from the deduction in favor of the recipient for the contributions by the recipient into the social security fund over the many years before he or she became eligible for social security. These observations are bordering on the obscure yet they could follow from the logic behind the present law.

As a matter of judgment I can find no reasonableness in this legislative classification.

I, too, would declare the set-off provision in the contract as void.

OPINION

(State of Michigan
Court of Appeals)

Heather Elizabeth O'Donnell, and Kathleen Anne O'Donnell, Michael Brent O'Donnell, and Timothy Hugh O'Donnell, by their next friend, Heather Ann O'Donnell, Plaintiffs-Appellants, v State Farm Mutual Automobile Insurance Company, an Illinois insurance corporation, Defendant-Appellee. No. 25429.

Before: Bashara, P.J., and V.J. Brennan, and T.M. Burns, JJ.

Bashara, P.J., dissenting.

I respectfully dissent.

A brief review of the facts is necessary to this discussion. Plaintiff's decedent was fatally injured in an automobile collision on February 19, 1975. The decedent was insured under a no-fault automobile insurance policy issued by the defendant. The policy provided in relevant part:

> "(5) the amount payable by the company under the terms of this insurance shall be reduced by
>
> > (a) the amount paid, payable, or required to be provided under the laws of any state or federal government; * * *."

The reduction in payments allowed by paragraph (5)(a) of the insurance policy is provided for in MCLA 500.2101(1); MSA 24.13109(1), which states:

> "(1) Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury."

The plaintiffs qualified for the maximum survivors loss of $1,000 per 30 day period. They also qualified for social security benefits of approximately $550 per month. Pursuant to paragraph (5)(a) of the insurance policy, the defendant reduced the insurance benefits $550 and paid the plaintiff approximately $450 per month.

Plaintiffs brought this action to recover the difference. Count I of plaintiff's complaint alleged breach of contract. Count II requested declaratory judgment that MCLA 500.3101(1); MSA 28.13109(1), was unconstitutional as a violation of equal protection and due process of law and void as incorporated in the insurance policy.

Defendant moved for summary judgment on both counts grounded on GCR 1963, 117.2(1) and (3). Defendant failed to file a supporting affidavit. Consequently, the trial court only considered whether the complaint failed to state a claim upon which relief could be granted. GCR 1963, 117.2(1).

The court held that count I failed to allege facts constituting breach of contract because the insurance contract provided for a reduction in benefits in the amount "required to be provided under the laws of any

state or federal government." The court further ruled that count II failed to state a claim because the contract was between private parties. Therefore, a constitutional attack could not be sustained, where there existed no state action.

A motion for summary judgment brought under GCR 1963, 117.2(1) merely tests the legal sufficiency of the claim as determined from the pleadings alone. *Todd* v *Biglow*, 51 Mich App 346, 349; 213 NW2d 733 (1974), *lv den* 391 Mich 816 (1974), 1 Honigman & Hawkins (2d ed), Committee Notes to GCR 1963, 117, p 353, 355. For the purposes of that motion, both at the trial and appellate levels, every well pled allegation in the complaint is assumed to be true. *Bielski* v *Wolverine Insurance Co*, 379 Mich 280, 283; 150 NW2d 708 (1967). The test is whether the plaintiff's claim, on the pleadings, is so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recovery. *Crowther* v *Ross Chemical & Mfg Co*, 42 Mich App 426, 431; 202 NW2d 577 (1972).

I am of the opinion the trial judge correctly ruled that count I failed to allege breach of contract. The facts pled do not allege breach of contract because, the insurance contract provided for a reduction in no-fault benefits to the extent of government benefits received.

The heart of this lawsuit is count II. The proscriptions of the Fourteenth Amendment, US Const, Am XIV, apply to actions of the state and not merely private conduct. *Shelly* v *Kraemer*, 334 US 1; 68 S Ct 836; 92 Led 1161 (1947). The Fourteenth Amendment applies to all state legislation which impairs due process or denies equal protection. *Civil Rights Cases*, 109 US 3, 11; 3 S Ct 18; 27 Led 835 (1883).

It is undisputed that the basis for paragraph (5)(a) of the insurance policy is the legislative enactment of MCLA 500.3109(1); MSA 24.13109(1). This is a state action. See *Peterson* v *City of Greenville*, 272 US 244; 83 S Ct 1119; 10 L Ed 323 (1963). I believe the trial judge erred in determining there was no state action, and consequently failing to consider the constitutional questions raised.

Appellate courts should not decide constitutional questions not passed upon by the trial court. *Cortez* v *International Union, United Automobile, Aircraft & Agricultural Workers of America (UAW-CIO)*, 339 Mich 446, 453; 64 NW2d 636 (1954), *Wilson* v *Boyer*, 269 Mich 197, 199; 256 NW2d 854 (1934). In my opinion the proper procedure is to remand to the trial judge for consideration of the constitutional questions raised in the action for declaratory judgment.[1] However, because my brothers found it necessary to consider the constitutional question of equal protection, I feel compelled to respond.

A classification must be reasonable not arbitrary, so that all persons similarly situated are treated alike. *Reed* v *Reed*, 404 US 71, 76; 92 S Ct 251; 30 L Ed 2d 225 (1971), *F. S. Royster Guano Co* v *Virginia*, 253 US 412, 415; 40 S Ct 560; 64 L Ed 989 (1920). The equal protection clause does not deny the state the power to treat different classes of persons in different ways.

---

[1] A remand seems particularly appropriate in light of the Majority's statement at p 7 n 2, that no proof was presented that MCLA 500.2109; MSA 24.13109, results in cost reduction. No proofs were presented because the dispute was resolved summarily without consideration of the constitutional question.

Railway Express Agency v *New York*, 226 US 106; 69 S Ct 463; 93 L Ed 533 (1949). *Barbier* v *Connolly*, 113 US 27; 5 S Ct 357; 28 L Ed 923 (1885). The grossest discrimination can sometimes lie in treating things that are different as though they were exactly alike. *Jenness* v *Fortson*, 403 US 431, 442; 91 S Ct 1970; 29 L Ed 2d 554 (1971).

The majority has correctly determined that a discrimination exists under MCLA 500.3109(1); MSA 24.13109(1), which requires public benefits to be setoff against no-fault insurance proceeds, while mandating no such reduction for private insurance benefits. The majority reasons that if the purpose of the provision is to reduce costs by eliminating duplicative recovery, such a classification is unreasonable and arbitrary, as it only operates on those who receive public benefits.

In my opinion the majority has combined two different classes and treated them as if they were alike. The same error occurred in *Richardson* v *Belcher*, 404 US 578; 92 S Ct 254; 30 L Ed 2d 231 (1971). In *Richardson* the appellee attacked the Social Security Act, § 224, 79 Stat 406 (1968), 42 USC 424a, which permitted reduction of his social security benefits in the amount of workmen's compensation benefits received by him. Appellee claimed the statute violated the Due Process Clause of the Fifth Amendment, US Const, Am V,[2] because it discriminated between those disabled employees who received workmen's compensation and those who received compensation from private insurance.

---

[2] The Federal Government's duty under the Due Process Clause of the Fifth Amendment includes guaranteeing all citizens equal protection of the laws. *Bolling* v *Sharpe*, 347 US 497; 74 S Ct 693; 98 L Ed 884 (1954).

The United States Supreme Court rejected any suggestion that the classes were alike. The government benefits were all part of a statutory scheme to insure a minimum threshold of recovery and to provide for needs not previously met by private insurance. The Court determined the classification could be justified by the conclusion of Congress that federal duplication of benefits could gradually weaken or atrophy state workmen's compensation systems. Furthermore, the Court refused to consider whether the purposes of Congress might have been better served had the offset provisions been extended to private insurance on the grounds that it would exceed their constitutional authority.

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifiction has some 'reasonable basis', it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality.' " *Dandridge* v *Williams*, 397 US 471, 485; 90 S Ct 1153; 25 L Ed 2d 491 (1970).

Social security as well as other governmental programs, such as workmen's compensation, benefits are part of an *overall statutory scheme* established as a matter of public policy to provide minimum compensation for *all* persons otherwise qualifying for benefits under the programs. See *Lasky* v *State Farm Insurance Co*, 296 So 2d 9, 21 (Fla 1974), *reh den*, 43 Fordham L R 379, 396. These programs were intended to fill a void not adequately covered by private insurance. See *Richardson* v *Belcher, supra*, 404 US 83-84. As such, a rational basis exists for distinguishing the classes.

The legislature could rationally conclude that reduction of no-fault proceeds to the extent one receives public benefits would eliminate duplicate recovery and reduce costs. Whether the legislature should have gone further by providing an offset for private insurance is not for us to consider under our limited function as a reviewing court under the constitution. *Richardson* v *Belcher, supra,* 202 US 84. The Equal Protection Clause does not preclude the State from taking one step at a time, addressing itself to the phase of the problem that seems most acute, while neglecting other phases of the problem. *Geduldig* v *Aiello,* 417 US 484, 495; 94 S Ct 2485; 41 L Ed 2d 256 (1974), *Williamson* v *Lee Optical Co,* 348 US 843, 849; 75 S Ct 461; 99 L Ed 563 (1955).

Assuming *arguendo* the Majority is correct that the classes are indistinguishable, their analysis still does not justify the conclusion that there is a deprivation of equal protection of the law. *San Antonio Independent School District* v *Rodriguez,* 411 US 1, 20; 93 S Ct 1278, 36 L Ed 2d 16 (1973), *reh den* 411 US 959; 93 S Ct 1919; 36 L Ed 2d 418 (1973), analyzed prior precedent to determine the common characteristics of classes discriminated against by inability to pay. The Court stated:

> "The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, *they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.*" (Emphasis supplied.)

That is not the case here. Under the statutory scheme everyone participating in no-fault is entitled to certain minimum benefits. The fact that some individuals are unable to purchase private insurance is of no moment.

As long as everyone has an opportunity to enjoy a minimum statutory benefit, there is no absolute deprivation. Any discrimination that might exist is insufficient to justify invoking the equal protection clause.

I would reverse the trial judge's summary judgment as to count II and remand for independent consideration of the constitutionality of MCLA 500.2109(1); MSA 24.13109(1).

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(State of Michigan
In the Circuit Court for the County of Washtenaw)

(Filed August 19, 1975)

Heather Elizabeth O'Donnell; et al., Plaintiff, vs State Farm Mutual Automobile Insurance Company, an Illinois Insurance Company, Defendant. File Number: 75 10205 CK.

At a session of said Court held in the City of Ann Arbor, Michigan this 19th day of August, 1975.

Present: The Honorable ROSS W. CAMPBELL
Circuit Judge

Defendant's Motion for Summary Judgment having come on to be heard and oral argument having been held and conclusions of law having been entered by the

Court with respect to the legal issues raised in Defendant's motion, such conclusions of law being more specifically stated as follows:

1. That Count I of Plaintiffs' Complaint fails to state a cause of action for the reason that Plaintiffs' Complaint fails to state facts which allege that the Defendant breached any of the provisions of said contract.

2. That Count II of Plaintiffs' Complaint fails to state a cause of action in that State Farm Mutual Automobile Insurance Company, in entering a contract of insurance which conforms to the requirements of The Michigan Statutes, and in particular MCLA 500.3109, is not itself engaged in state action; consequently, any claim that the contract is itself unconstitutional is unsupportable as a matter of law.

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment be, and the same hereby is, granted.

/s/ Ross W. Campbell
Circuit Court Judge

Approved as to Form Only:

CALDER AND KIRKENDALL	DeVINE AND DeVINE
By /s/ Robert E. Logeman	By: /s/ Allyn D. Kantor
Attorney for Plaintiff	Attorneys for Defendant

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(State of Michigan
In the Supreme Court)

On Appeal from the Court of Appeals

(L.C. No. 72 10205 CK - C.O.A. No. 25429)

(Filed May 1, 1979)

Heather Elizabeth O'Donnell, and Kathleen Anne O'Donnell, Michael Brent O'Donnell and Timothy Hugh O'Donnell, by their next friend, Heather Elizabeth O'Donnell, Plaintiffs-Appellees, vs State Farm Mutual Automobile Insurance Company, an Illinois insurance corporation, Defendant-Appellant. Supreme Court No. 58833.

Notice is hereby given that HEATHER ELIZABETH O'DONNELL, and KATHLEEN ANNE O'DONNELL, MICHAEL BRENT O'DONNELL and TIMOTHY HUGH O'DONNELL, by their next friend, HEATHER ELIZABETH O'DONNELL, the Plaintiffs-Appellees in the Michigan Supreme Court, hereby appeals as appellants to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Michigan, reversing the Court of Appeals and affirming the trial court's entry of Summary Judgment, entered in this action on January 4, 1979, and which a

timely motion for rehearing was denied in an order dated March 8, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ Robert E. Logeman (co-counsel with
Eugene F. Black in the U.S.
Supreme Court)
as counsel for Plaintiffs-Appellees
in the Michigan Supreme Court and for
Appellants in the United States
Supreme Court
301 West Michigan Avenue
Suite Four Hundred
Ypsilanti, Michigan 48197
Telephone (313) 482-7168

Twenty-Second Judicial Circuit
Washtenaw County, Michigan—ss.

I hereby certify that the foregoing is a true copy of the original on file in this Court and cause. Valid Only With Embossed Seal.

Dated: 5-1-79

ROBERT M. HARRISON
County Clerk

By /s/ Marjorie S. Gensley
Deputy

AFFIDAVIT OF SERVICE

(State of Michigan
In the Supreme Court)

On Appeal from the Court of Appeals

State of Michigan
County of Washtenaw—ss.

I, ROBERT E. LOGEMAN, depose and say that I am an attorney in the office of CALDER, KIRKENDALL AND LOGEMAN, P.C., an attorney of record for HEATHER ELIZABETH O'DONNELL, and KATHLEEN ANNE O'DONNELL, MICHAEL BRENT O'DONNELL and TIMOTHY HUGH O'DONNELL, by their next friend HEATHER ELIZABETH O'DONNELL, Appellants in the United States Supreme Court and Plaintiffs-Appellees in the Michigan Supreme Court, and that on May 1st, 1979, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the attached Notice of Appeal to the Supreme Court of the United States on each of the parties required to be served herein, as follows:

On STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Insurance Corporation, Defendant/Appellant in the Michigan Supreme Court and Appellee in the United States Supreme Court, by mailing the copies in a duly addressed envelope, with first class postage prepaid, to BODMAN, LONGLEY & DAHLING, by Theodore Souris and James R. Buschmann, co-counsel of record for said STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Insurance Corporation, at their office at 34th Floor, 100 Renaissance Center, Detroit, Michigan 48243.

On STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Insurance Corporation, Defendant-Appellant in the Michigan Supreme Court and Appellee in the United States Supreme Court, by mailing the copies in a duly addressed envelope, with first class postage prepaid, to DeVINE, DeVINE, KANTOR & SERR, by Allyn D. Kantor, co-counsel of record for said STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Insurance Corporation, at their office at 300 National Bank & Trust Building, Ann Arbor, Michigan 48108.

ALL PARTIES REQUIRED TO BE SERVED HAVE BEEN SERVED.

/s/ ROBERT E. LOGEMAN
co-counsel with Eugene F. Black, of
the United States Supreme Court Bar

Subscribed and sworn to before me this 1st day of May, 1979.

/s/ Cheryl L. Poland, Notary Public
Washtenaw County, State of Michigan
My commission expires: 4-25-81

Twenty-Second Judicial Circuit
Washtenaw County, Michigan—ss.

I hereby certify that the foregoing is a true copy of the original on file in this Court and cause. VALID ONLY WITH EMBOSSED SEAL.

Dated: 5-1-79
ROBERT M. HARRISON, County Clerk
By /s/ Maynie S. Gensley
Deputy

CONSTITUTIONAL PROVISIONS AND OTHER STATUTES INVOLVED

US CONST AM XIV, Sec 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

MCLA 500.3101(1)

> "The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. Security shall be in effect continuously during the period of registration of the motor vehicle."
>
> Vol. 28, 1978-1979 Supplement, at 178

MCLA 500.3102

> "(1) A nonresident owner or registrant of a motor vehicle not registered in this state shall not operate or permit the vehicle to be operated in this state for an aggregate of more than 30 days in any calendar year unless he continuously maintains security for the payment of benefits.

(2) An owner or registrant of a motor vehicle with respect to which security is required who operates the motor vehicle or permits it to be operated upon a public highway in this state without having in full force and effect security complying with this section or sections 3101[1] or 3103[2] is guilty of a misdemeanor. Any other person who operates a motor vehicle upon a public highway in this state with the knowledge that the owner or registrant does not have security in full force and effect is guilty of a misdemeanor. A person convicted of a misdemeanor under this section shall have his license and, if an owner or registrant, his registration revoked and may be fined not less than $100.00 nor more than $500.00 or imprisoned for not more than 1 year or both." (footnotes omitted.)

Vol. 28, 1978-1979 Supplement, at 181

MCLA 500.3105(1), (2), (3)

"(1) Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter.

(2) Personal protection insurance benefits are due under this chapter without regard to fault.

(3) Bodily injury includes death resulting therefrom and damage to or loss of a person's prosthetic devices in connection with the injury."

Vol. 28, 1978-1979 Supplement, at 182

MCLA 500.3108

"Personal protection insurance benefits are payable for a survivors' loss which consists of a loss, after the date on which the deceased died, of contributions of tangible things of economic value, not including services, that dependents of the deceased at the time of his death would have received for support during their dependency from the deceased if he had not suffered the accidental bodily injury causing death and expenses, not exceeding $20.00 per day, reasonably incurred by these dependents during their dependency and after the date on which the deceased died in obtaining ordinary and necessary services in lieu of those that the deceased would have performed for their benefit if he had not suffered the injury causing death. The benefits payable for survivors' loss in connection with the death of a person in a single 30-day period shall not exceed $1,000.00 and is not payable beyond the first 3 years after the date of the accident."

Vol. 28, 1978-1979 Supplement, at 184

MCLA 500.3109(a)

"An insurer providing personal protection insurance benefits shall offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured. The deductibles and exclusions required to be offered by this section shall be subject to prior approval by the commissioner and shall apply only to benefits payable to the person named in the

policy the spouse of the insured and any relative of either domiciled in the same household."
P.A. 1956, No. 218, § 3100a, added by P.A. 1974, No. 72, § 1, Eff. June 3, 1974.

Vol. 28, 1978-1979 Supplement, at 186

MCLA 500.3110(1), (a), (c)

"(1) The following persons are conclusively presumed to be dependents of a deceased person:

(a) A wife is dependent on a husband with whom she lives at the time of his death. . . .

(c) A child while under the age of 18 years, or over that age but physically or mentally incapacitated from earning, is dependent on the parent with whom he lives or from whom he receives support regularly at the time of the death of the parent."

Vol. 28, 1978-1979 Supplement, at 185

1973 N.Y. Laws, Chp. 13, § 671 (2) (b)

2. "first party benefits" means payments to reimburse a person for basic economic loss on account of personal injury arising out of the use or operation of a motor vehicle in this state, less:

. . . .

(b) amounts recovered or recoverable on account of such injury under state or federal laws providing social security disability benefits, or workman's compensation benefits; and . . . .

1973 N.Y. Laws, Vol. 1, at p. 5 - 7

1974 Pa. Laws, No. 176, § 206(a) Net loss.

(a) General. — Except as provided in section 108(a) (3) of this act, all benefits or advantages (less reasonably incurred collection costs) that an individual receives or is entitled to receive from social security (except those benefits provided under Title XIX of the Social Security Act and except those medicare benefits to which a person's entitlement depends upon use of his so-called "life-time reserve" of benefit days) workmen's compensation, any State-required temporary, nonoccupational disability insurance, and all other benefits (except the proceeds of life insurance) received by or available to an individual because of the injury from any government, unless the law authorizing or providing for such benefits or advantages makes them excess or secondary to the benefits in accordance with this act, shall be subtracted from loss in calculating net loss.

1974 Pa. Laws, Vol. 1, at p. 511 - 512

1973 Hawaii Sess. Laws, Act 203, Sec. 294-5

Sec. — -5(b) All no fault benefits shall be paid secondarily and net of any benefits a person receives because of the injury from social security laws, workman's compensation laws, public assistance laws, and any medical or health insurance policy applicable.

1973 Hawaii Sess. Laws, at p. 385

1973 Nev. Stats, Vol. 1, Chapter 530, § 12, § 33

§ 12 "Net benefits payable" means benefits payable less all assistance or advantages a person receives or is entitled to receive from Social Security, the railroad retirement act, workman's compensation or under the federal employer liability act as calculated in section 33 of this act.

1973 Nev. Stat, Vol. 1, at 824

§ 33 All assistance or advantages a person receives or is entitled to receive from social security, the railroad retirement act, workman's compensation or under the federal employer liability act by reason of an injury arising out of the use or maintenance of a motor vehicle are subtracted from benefits payable in calculating net benefits payable. Basic reparation benefits are primary in relation to all other insurance.

1973 Nev. Stat, Vol. 1, at p. 830

1974 Ky. Acts, Chap. 385 § 12(1)

(1) All benefits or advantages a person receives or is entitled to receive because of injury from social security and workman's compensation are subtracted in calculating net loss.

1974 Ky. Acts, at p. 756

1973 N.J. Laws, Chapter 70, § 6

6. Collateral source. The benefits provided in section 4a,b,c,d, and e, shall be payable as loss accrues, upon written notice of such loss and without regard to collateral sources, except that benefits collectible under workman's compensation insurance, employees temporary disability benefit statutes and medicare provided under federal law, shall be deducted from the benefits collectible under section 4a,b,c,d, and e.

1972 N.J. Laws, Vol 1, at p. 220

(Note § 4a medical expenses, 4b income loss, 4c essential services, 4d survivors loss)

1973 Utah Laws, Chap 55, § 7(3)

7(3) The benefits payable to any injured person under section 6 of this act shall be reduced by:

a. Any benefits which that person receives or is entitled to receive as a result of an accident covered in this act under any workman's compensation plan or any similar statutory plan; and

b. Any amounts which that person receives or is entitled to receive from the United States or any of its agencies because of military enlistment, duty or service.

1973 Utah Laws, at p. 144

1971 Fla. Laws, ch 71 - 252 § 7 (4)

(4) Benefits; when due. — Benefits due from an insurer under §§ 627.730-627.741 shall be primary, except that benefits received under any workmen's compensation law or Medicaid as provided under 42 USC 1396 et seq., shall be credited against the benefits provided by subsection (1) and shall be due and payable as loss accrues, upon receipt of reasonable proof of such loss and the amount of expenses and loss incurred which are covered by the policy issued under §§ 627.730 - 627.741.

1971 Fla. Laws, Vol 1, at p. 1361-1362

H.R. 1597, 95th Cong., 1st Sess. (1977), § 210, p. 37

§ 210 (b) NET LOSS. — An approved State plan shall provide that —

(1) All benefits (less reasonably incurred collection costs) that an individual receives, or is entitled to receive, from social security (except those benefits provided under title XIX of the Social Security Act); workmen's compensation; any State-required temporary, nonoccupational disability insurance; all other benefits (except the proceeds of life insurance) received by or available to an individual because of the injury from any government; and all benefits received by or available to an individual under an assigned claims program under section 207(c) (2) (unless the law authorizing or providing for such benefits or advantages makes them excess or secondary to no fault benefits) shall be subtracted from loss in calculating net loss.

S. 354, 94th Cong., 2d Sess. (1975) § 208 p. 90-91

H.R. 5149, 95th Cong., 1st Sess. (1977) §208, p. 62-63

§ 208 (a) GENERAL. — Except as provided in paragraph (3) of subsection (a) of 108 of this Act, all benefits or advantages (less reasonably incurred collection costs) that an individual receives or is entitled to receive from social security (except those benefits provided under title XIX of the Social Security Act), workmen's compensation, any State-required temporary, nonoccupational disability insurance, and all other benefits (except the proceeds of life insurance) received by or available to an individual because of the injury from any government,

unless the law authorizing or providing for such benefits or advantages makes them excess or secondary to the benefits in accordance with this Act, shall be subtracted from loss in calculating net loss.

H.R. 2300, 95th Cong., 1st Sess. (1977), § 2(16), p. 5-6

§ 2 (16) The term "net economic loss" means, in the case of injury or death, economic loss reduced (but not below zero) by the amount of any benefit or payment received (or legally entitled to be received and actually available to the claimant) for losses resulting from such injury or death from any of the following sources —

(A) any public health insurance or plan;

(B) any private insurance or plan containing explicit provisions making its benefits primary to any benefits under a qualifying no-fault policy.

H.R. 2508, 95th Cong., 1st Sess. (1977), § 3(9), p. 5-6

§ 3 (9) The term "net economic loss" means, in the case of injury or death, "economic loss" reduced (but not below zero) by the amount of:

(A) Taxes which would have been payable on the amount which would have been earned but for such injury or death; and

(B) Any benefit or payment received, or entitled to be received, for losses resulting from such injury or death under any provision of law or any insurance or other source of benefits; except, benefit or payment received, or entitled to be received —

(i) in discharge of familial obligations of support;

(ii) by way of succession at death:

(iii) as proceeds of life insurance;

(iv) as gratuities, or

(v) as proceeds of any contract, policy of disability, health and accident, or other insurance or other source of benefits containing an explicit provision making its benefits supplemental to those in accordance with the provisions of section 5(a) of this Act, or making the benefits under section 5(a) deductible from the benefits under such contract, policy or other insurance or source.

If any contract, policy of disability, health and accident, or other source of benefits does not provide that its benefits shall be supplemental to those under section 5(a) of this Act or that the benefits under said section 5(a) shall be deducted from its benefits, economic loss shall be reduced by the amount of any benefit or payment received, or entitled to be received, from such contract, policy or other insurance or source.

H.R. 13048, 95th Cong., 2d Sess. (1978), § 109 p. 36

S. 1381, 95th Cong., 2d Sess. (1977), p. 41-42

§ 109 (b) REDUCTION FOR BENEFITS RECEIVED FROM GOVERNMENTS. — An approved State plan shall provide that all benefits (less reasonably incurred collection costs) that an individual receives pursuant to entitlement, or is entitled to receive, with respect to an injury, from —

(1) social security (except benefits under title XIX of the Social Security Act);

(2) workmen's compensation;

(3) temporary nonoccupational disability insurance that is required by a State; and

(4) any government (except the proceeds of government life insurance);

shall be subtracted in calculating basic no-fault benefits, unless the law authorizing or providing for those benefits makes them secondary to or duplicative of no-fault benefits.

Supreme Court, U. S.
FILED
JUL 18 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1812

HEATHER ELIZABETH O'DONNELL, and KATHLEEN ANNE O'DONNELL, MICHAEL BRENT O'DONNELL, and TIMOTHY HUGH O'DONNELL, by their next friend, HEATHER ELIZABETH O'DONNELL,
Appellants,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Insurance Corporation,
Appellee.

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT

BODMAN, LONGLEY & DAHLING
By: Theodore Souris
James R. Buschmann
Counsel for Appellee,
State Farm Mutual Automobile Insurance Company
34th Floor, 100 Renaissance Center
Detroit, Michigan 48243
(313) 259-7777

Interstate Brief & Record Co., Wurlitzer Bldg., 1509 Broadway, Detroit, MI 48226
962-8745 962-8746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1812

HEATHER ELIZABETH O'DONNELL, and KATHLEEN ANNE O'DONNELL, MICHAEL BRENT O'DONNELL, and TIMOTHY HUGH O'DONNELL, by their next friend, HEATHER ELIZABETH O'DONNELL,
Appellants,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Insurance Corporation,
Appellee.

MOTION TO DISMISS APPEAL

Now comes appellee State Farm Mutual Automobile Insurance Company by its attorneys, Bodman, Longley & Dahling, and moves that the Court dismiss the appeal in the above-entitled action for the reasons stated in the accompanying brief.

BODMAN, LONGLEY & DAHLING

By: Theodore Souris
and
James R. Buschmann

Attorneys for Appellee, State Farm Mutual Automobile Insurance Company
34th Floor, 100 Renaissance Center
Detroit, Michigan 48243
(313) 259-7777

July 18, 1979

TABLE OF CONTENTS

	Page
INDEX TO AUTHORITIES	i
INTRODUCTION	1
ARGUMENT	1
Due Process Claim	4
Equal Protection	10
CONCLUSION	16

INDEX TO AUTHORITIES

Cases:

Califano v Boles, 47 USLW 4874, — US —, — S Ct —, — L Ed — (1979) 4

City of Charlotte v Local 660, International Association of Firefighters, 426 US 283, 96 S Ct 2036, 48 L Ed 2d 636 (1976) 13

Dandridge v Williams, 397 US 471, 90 S Ct 1153, 25 L Ed 2d 491 (1970) 10,11,14

Katzenbach v Morgan, 384 US 641, 86 S Ct 1717, 16 L Ed 2d 828 (1966) 9

Massachusetts Board of Retirement v Murgia, 427 US 307, 96 S Ct 2562, 49 L Ed 2d 520 (1976) .. 15

McAvoy v H B Sherman Co, 401 Mich 419, 258 NW2d 414 (1977) 9

Nebbia v New York, 291 US 502, 54 S Ct 505, 78 L Ed 940 (1934) 4

Page

New Orleans v Dukes, 427 US 297, 96 S Ct 2513, 49 L Ed 2d 511 (1976) 9

Ohio Bureau of Employment Services v Hodory, 431 US 471, 97 S Ct 1898, 52 L Ed 2d 513 (1977) 15

Ex Parte Poresky, 290 US 30, 54 S Ct 3, 78 L Ed 152 (1933) 6

Richardson v Belcher, 404 US 78, 92 S Ct 254, 30 L Ed 2d 231 (1971) 10

Sears v Cottrell, 5 Mich 250 (1858) 14

Weinberger v Salfi, 422 US 749, 95 S Ct 2457, 45 L Ed 2d 522 (1975) 11,14

West Coast Hotel v Parrish, 300 US 379, 57 S Ct 578, 81 L Ed 703 (1937) 4

Williamson v Lee Optical of Oklahoma, 348 US 483, 75 S Ct 461, 99 L Ed 563 (1955) 4

Statutes:

MCLA 500.3101, MSA 24.13101 (A89) 1

MCLA 500.3108, MSA 24.13108 (A91) 2

MCLA 500.3109, MSA 24.13109 2,5,7,8,15,16

MCLA 500.3109a, MSA 24.13109(1) (A91-A92) 12,15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1812

HEATHER ELIZABETH O'DONNELL, and KATHLEEN ANNE O'DONNELL, MICHAEL BRENT O'DONNELL, and TIMOTHY HUGH O'DONNELL, by their next friend, HEATHER ELIZABETH O'DONNELL,
Appellants,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Insurance Corporation,
Appellee.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL

ARGUMENT

Introduction

Michigan's no-fault automobile insurance act, MCLA 500.3101, *et seq.*, MSA 24.13101, *et seq.*, became effective October 1, 1973.

On February 19, 1974, appellants' decedent, Gary B. O'Donnell was killed in an automobile accident. Mr. O'Donnell carried a no-fault auto insurance policy

issued by appellee State Farm Mutual Automobile Insurance Company in accordance with the Michigan no-fault act.

As survivors of the decedent, appellants were entitled to survivors' benefits pursuant to the terms of the no-fault policy and section 3108 of the no-fault act, MCLA 500.3108, MSA 24.13108. (A91)*.

Appellants were entitled to the maximum amount of survivors' benefits payable pursuant to section 3108, $1,000 per month for three years, but subject to the requirement of the no-fault policy** and section 3109(1) of the no-fault act, MCLA 500.3109(1), MSA 24.13109(1)***, that benefits provided to appellants under the laws of any state or federal government be subtracted from their no-fault survivors' benefits.

Because appellants were entitled to federal social security survivors' benefits, State Farm, pursuant to section 3109(1) and in accordance with its insurance policy, subtracted from each monthly no-fault benefit

---

*Section 3108 has been amended to provide cost of living increases in survivors' benefits. See 1978 PA 459. The amendment, adopted after appellants' claim arose, is not applicable to appellants' benefits.

"Any amount payable by the company under the terms of this insurance shall be reduced by (a) the amount paid, payable or required to be provided under the laws of any state or federal government *." (Op. Michigan Supreme Court, A3).

***"(1) Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury."

payment to appellants the amount of social security benefits payable to them.

Appellants claim that the subtraction of social security benefits from no-fault benefits which State Farm is compelled to make denies them due process of law. They further claim that since the no-fault act does not require a similar reduction of no-fault benefits on account of other private insurance benefits received, that they are denied equal protection of the laws. Both claims are made pursuant to the Fourteenth Amendment to the Constitution of the United States. (A89).

The Michigan Supreme Court determined that the required subtraction of governmental benefits does not contravene appellants' constitutional rights to due process and equal protection because there is a rational legislative purpose served by the requirement. 404 Mich 524, — NW2d — (1979). (A1).

Appellants have appealed that decision to this Court.

State Farm contends, as the Michigan Supreme Court found, that the statutorily required subtraction of governmental benefits is manifestly rational. It furthers the legitimate legislative objective of keeping the cost of mandatory no-fault insurance within the reach of the citizens of Michigan while, at the same time, guaranteeing a basic amount of survivors' benefits whether they be no-fault benefits alone or a combination of no-fault benefits and governmental benefits. The differing treatment of governmental benefits and private insurance benefits furthers the legitimate legislative goal of permitting those no-fault insureds who wish to do so to increase their coverage by purchasing additional private insurance.

State Farm, therefore, moves that this appeal be dismissed because no substantial federal question has been raised by appellants.

Due Process Claim

For the past 40 years the test for determining whether social and economic legislation meets the requirements of substantive due process has been whether the challenged law has a rational relation to a valid state objective.

Thus, this Court stated in *West Coast Hotel* v *Parrish*, 300 US 379, 391, 57 S Ct 578, 581-582, 81 L Ed 703 (1937):

> "*** Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."

In *Williamson* v *Lee Optical of Oklahoma*, 348 US 483, 488, 75 S Ct 461, 464, 99 L Ed 563 (1955), this Court stated:

> "*** But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."

See also *Nebbia* v *New York*, 291 US 502, 529-537, 54 S Ct 505, 512-516, 78 L Ed 940 (1934), and *Califano* v *Boles*, 47 USLW 4874, — US —, — S Ct —, — L Ed — (1979).

It was argued to the Michigan Court of Appeals and to the Michigan Supreme Court that section 3109(1) violates due process principles because it could be interpreted to require the subtraction from no-fault benefits of any governmental benefits, regardless whether the governmental benefits were payable as a result of the same loss for which the no-fault benefits were paid.

Thus, there was speculation whether no-fault benefits might be reduced by governmental retirement benefits. See, e.g., the concurring opinion of Judge Brennan in the decision of the Michigan Court of Appeals, 70 Mich App 487, 500, 245 NW2d 801, 805 (1976). (A75).

The Michigan Supreme Court met this argument by reviewing the legislative history of section 3109(1) and by holding that the section required the subtraction of only those governmental benefits which duplicate no-fault benefits payable because of an auto accident. (A8).

The Michigan Supreme Court then analyzed section 3109(1), as thus interpreted, in light of the applicable due process test:

> "This set-off is not arbitrary and it does have a rational basis. It promotes the valid legislative objectives of insuring payment for economic loss up to $1,000 per month for three years and of attempting to reduce or contain the cost of no-fault insurance by eliminating some of the benefit duplication that would otherwise occur. This means chosen, a set-off of duplicative government benefits, is rationally related to that end. It reduces the amount that the insurance companies must pay out, making it possible for

> them to reduce the amount that they must charge, and it does so only in those situations where the benefits are redundant. * * *'' (A10).

Appellants make no claim that it is an invalid exercise of the legislative police power to require motorists to carry insurance to protect themselves and others in the case of accident. That issue was decided long ago. See *Ex Parte Poresky*, 290 US 30, 54 S Ct 3, 78 L Ed 152 (1933). An equally supportable constitutionally permissible legislative objective is to reduce the cost of such mandatory insurance coverage so that the poor are not prohibited from owning and using automobiles.

The only question remaining, then, is whether there is a rational relationship between the subtraction of governmental benefits and the twin, but competing, purposes of providing a substantial survivors' benefit to dependents of auto accident victims while at the same time reducing the cost of the insurance coverage to the extent possible.

One method of reducing insurance premiums, of course, is to reduce the level of benefits. As the Michigan Supreme Court found, the Michigan Legislature weighed the cost/benefit ratio in determining that the optimum required survivors' benefit should be $1,000 per month for a duration of three years. While reducing the benefit would reduce cost, it would directly conflict with the legislative goal of providing the optimum benefit. Other cost-reducing means to reduce no-fault premium costs were available to the Legislature. The one it chose was to make the no-fault coverage secondary to other governmental

benefits payable as a result of the insured's death. Thus, the no-fault survivors' benefit was made payable by the no-fault insurer to the extent necessary to bring the survivors' total benefits from public and no-fault insurance sources up to the amount determined by the Legislature to be adequate compensation for the economic loss of the survivors.

By so utilizing the virtually universal social security survivors' benefit, the no-fault insurance premium required to fund the survivors' benefits was reduced because insurance premiums, of course, vary directly with the risk insured. Thus, because most Michigan motorists are subject to two mandatory insurance programs, no-fault and social security, the governmental set-off in the no-fault act assures that the motorist is not charged for duplicative coverage.

On its face, section 3109(1) serves legitimate legislative goals of providing the highest feasible level of benefits at the lowest premium cost to the insured.

In spite of this analysis, however, appellants contend that the Michigan Supreme Court erred in determining that the social security survivors' benefits were "duplicative" of the no-fault survivors' benefits payable but for the required set-off. They contend that their loss was in excess of $1,000 per month and that the social security survivors' benefits, therefore, did not "duplicate" the no-fault benefits in compensating the actual loss as a matter of fact.

Assuming, *arguendo*, that appellants' loss exceeded $1,000 per month, although that fact is not in the record, the due process test requires no different result.

Due process does not require that the Michigan no-fault act provide compensation for every survivor's actual loss. It is surely a legislature's prerogative to determine the amount of coverage to be required under a mandatory no-fault insurance act. In making that decision, a legislature is entitled to consider other sources of economic benefits generally, if not universally, available to survivors, e.g., as in this case, social security survivors' benefits. The Michigan Legislature's set-off provision in section 3109(1) of the act is a simple mechanism to assure that no more than the amount so determined by the Legislature as a mandatory benefit coverage be payable.

The legislative purpose was to require motorists to carry survivors' coverage in an adequate amount, and that amount was determined by Michigan's Legislature to be the actual loss up to a maximum of $1,000 per month for three years. The set-off for governmental benefits insures that a no-fault insured's survivors will receive compensation for their actual loss up to the maximum amount determined by the Legislature to be adequate, through a combination of governmental and no-fault benefits.

Nothing in due process requires that the Legislature have as its purpose the actual compensation of all losses by a mandatory insurance program.

This Court long has upheld a legislature's prerogative in making such determinations as the amount of an economic benefit mandated by statute. Michigan's Supreme Court summarized this Court's and its own

acknowledgment of that prerogative in the following passage from its *O'Donnell* opinion (A7):

> "Nor is it necessary that the Legislature deal with every aspect of a problem at the same time:
>
> > " '[W]e are guided by the familiar principles that a "statute is not invalid under the Constitution because it might have gone farther than it did," * * * that a legislature need not "strike at all evils at the same time," * * * and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" * * *.' [Citing *Katzenbach* v *Morgan*, 384 US 641, 657, 86 S Ct 1717, 16 L Ed 2d 828 (1966); *New Orleans* v *Dukes*, 427 US 297, 305, 96 S Ct 2513, 49 L Ed 2d 511 (1976)].
>
> "In short, we do not sit 'as a superlegislature to judge the wisdom or desirability of legislative policy determinations'. [Citing *New Orleans* v *Dukes, supra*, 303]. We sit as a court to determine whether there is a rational basis for the Legislature's judgment. If there is, then that judgment must be sustained:
>
> > " 'It is *not* this Court's role to decide whether the Legislature acted wisely or unwisely in enacting this statute. We will not substitute our own social and economic beliefs for those of the Legislature, which is elected by the people to pass laws.' " [Citing *McAvoy* v *H B Sherman Co.*, 401 Mich 419, 439, 258 NW2d 414 (1977)]. 404 Mich at 543, —— NW2d at ——.

Appellants' argument concerning duplication of benefits presupposes that the Court's role in reviewing this case is to decide whether Michigan's Legislature should have permitted the receipt of both governmental and private benefits in excess of $1,000 per month if the amount of loss is not overcompensated. But such an argument ignores the Legislature's right to determine the amount of no-fault benefits for which it requires motorists to pay.

The sole due process question is whether the Legislature rationally could reduce the cost of no-fault coverage by setting off duplicative governmental benefits. State Farm submits that the answer to that question is self-evident and that no substantial federal due process question has been presented by appellants.

Equal Protection

Appellants also contend that principles of equal protection are offended because section 3109(1) requires the subtraction of governmental benefits which duplicate no-fault survivors' benefits, but does not likewise require subtraction of duplicative private insurance benefits.

The test applicable to economic and social legislation under equal protection principles was stated in *Richardson* v *Belcher*, 404 US 78, 81-84, 92 S Ct 254, 257-258, 30 L Ed 2d 231 (1971):

> "A statutory classification in the area of social welfare is consistent with the Equal Protection Clause of the Fourteenth Amendment if it is 'rationally based and free from invidious discrimination.' *Dandridge* v *Williams*, 397 US 471, 487, 90 S Ct 1153, 1162, 25 L Ed 2d 491.

> While the present case, involving as it does a federal statute, does not directly implicate the Fourteenth Amendment's Equal Protection Clause, a classification that meets the test articulated in *Dandridge* is perforce consistent with the due process requirement of the Fifth Amendment. * * *
>
> * * *
>
> "If the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment."

See also *Dandridge* v *Williams*, 397 US 471, 485, 90 S Ct 1153, 25 L Ed 2d 491 (1970); and *Weinberger* v *Salfi*, 422 US 749, 769, 95 S Ct 2457, 45 L Ed 2d 522 (1975).

State Farm already has identified the legislative goals which justify constitutionally the Michigan Legislature's set-off of governmental benefits in section 3109(1). The remaining question to be considered under equal protection principles is, therefore, whether there are any rationally discernible differences between governmental and private insurance benefits which justify their different treatment in light of the permissible legislative purpose of reducing insurance premiums for mandatory no-fault coverages.

In simplest terms, was the Michigan Legislature constitutionally required either to set off both governmental and private duplicative benefits against no-fault benefits or to set off neither?

If both governmental and private benefits were set off, no-fault insureds could not economically increase

their survivors' benefits to the extent their needs and incomes warrant. As pointed out by the Michigan Supreme Court (A12), a set-off of private as well as governmental benefits would require that in order to increase their total survivors' benefits payable because of an auto accident, no-fault insureds first would have to purchase private insurance benefits of $1,000 per month to be set off against the no-fault benefits, and then, in addition, purchase the amount of coverage in excess of the no-fault maximum which the insured desires.

It obviously would be economically illogical and wasteful to require private benefits to be set off because it would force those wishing to purchase increased survivors' benefits to waste the premium paid for the first $1,000 per month in increased benefits.

Appellants recognize the truth in this statement (Jurisdictional Statement, p. 13), but contend that the Legislature could just as easily have made the set-off of governmental benefits optional with the insured as was later done with private benefits.*

There are two answers to appellants' contention. First, the benefits under social security are set by statute and cannot be varied by those covered, whereas the purchaser of private benefits may seek out the insurer which offers the benefits best tailored to his needs for the price he wishes to pay. This difference makes private benefits the logical choice for optional coverage.

---

*Section 3109a, MCLA 500.3109a; MSA 24.13109(1), (A91-92), became effective June 3, 1974.

Second, and more importantly, once it is recognized that the Legislature acted rationally in allowing no-fault insureds to purchase coverage in excess of that required by the no-fault act, the applicable principles of equal protection clearly allow the legislature the widest latitude in its choice of method in attaining its objective.

In *City of Charlotte* v *Local 660, International Association of Firefighters*, 426 US 283, 288, 96 S Ct 2036, 2040, 48 L Ed 2d 636 (1976), this Court determined that the city was not constitutionally required to withhold union dues from firemen's pay simply because it had other payroll withholding programs. The Court stated:

> "Given the permissibility of creating standards and the reasonableness of the standards created, the District Court's conclusion that it would be no more difficult for the city to withhold dues for the union than to process other deductions is of no import.* * *"

Thus, the Michigan Legislature was under no constitutional compulsion to provide a complex system of elections concerning collateral benefits to each no-fault insured when its purpose could be substantially attained simply by allowing but not requiring the set-off of private benefits.

The Michigan Supreme Court recognized (A6) this principle in this comprehensive passage:

> "* * * So long as the Legislature's judgment is supported by a rational or reasonable basis, the choices made and the distinctions drawn are constitutional. The United States Supreme Court and our Court have instructed:

> " 'If the classification has some "reasonable basis", it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality". * * * "The problems of government are practical ones and may justify, if they do not require, rough accommodations * * *" '. [Citing *Dandridge* v *Williams*, 397 US 471, 485, 90 S Ct 1153, 25 L Ed 2d 491 (1970), *Weinberger* v *Salfi*, 422 US 749, 769, 95 S Ct 2457, 45 L Ed 2d 522 (1975)].
>
> " 'If it be said, the law is unnecessarily severe, and may sometimes do injustice, without fault in the sufferer under it, our reply is: these are considerations that may very properly be addressed to the legislature, but not to the judiciary — they go to the expediency of the law, and not to its constitutionality.' [Citing *Sears* v *Cottrell*, 5 Mich 250, 254 (1858)].

"The responsibility for drawing lines in a society as complex as ours — of identifying priorities, weighing the relevant considerations and choosing between competing alternatives — is the Legislature's, not the judiciary's. Perfection is not required:

> " '[T]he drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary.' [Citing

> *Massachusetts Board of Retirement* v *Murgia*, 427 US 307, 314, 96 S Ct 2562, 49 L Ed 2d 520 (1976); *Ohio Bureau of Employment Services* v *Hodory*, 431 US 471, 489, 97 S Ct 1898, 52 L Ed 2d 513 (1977)]." 404 Mich at 542, —— NW2d at ——.

An observation concerning the relationship of section 3109a of the no-fault act to this case may be appropriate. Section 3109a allows each no-fault insured to choose whether to have other private health and accident benefits set off against no-fault benefits.

Section 3109a was added to Michigan's no-fault act after Mr. O'Donnell's death and, therefore, has no direct application in this case.

The two sections, 3109(1) and 3109a, when considered together, display a comprehensive and reasonable plan under which no-fault coverage is made secondary to governmental benefit programs by section 3109(1), thus reducing what would otherwise be nearly universal double coverage and enabling no-fault insurers to offer reduced rates. At the same time, the no-fault insured is offered a choice by section 3109a either to coordinate his privately purchased health and accident coverage with his no-fault coverage, thus reducing his no-fault premium, or to increase his total insurance coverage by purchasing health and accident coverage which will pay benefits in addition to those provided by no-fault coverage.

It is not unconstitutional discrimination when each no-fault insured's governmental benefits are subtracted from his no-fault benefits (regardless of his economic

status) while at the same time each no-fault insured, with the resources and inclination to do so, is permitted to purchase increased coverage. It is not discrimination when all are simply permitted to purchase what they wish with the resources they have.

CONCLUSION

Appellants assert that this case presents a substantial federal question because the Michigan no-fault act in effect confiscates federal social security benefits for the benefit of Michigan no-fault insurers. That, of course, is a faulty analysis of the Michigan no-fault act and distorts the actions of the Michigan Legislature.

Nothing in the act in any way affects the amount of social security benefits which appellants receive or retain. Section 3109(1) acts solely to adjust no-fault benefits in relation to governmental benefits and nothing more and, as the Michigan Supreme Court perceived, the legislative purpose obviously was to reduce the no-fault premium, not increase the insurer's profits. (A8).

State Farm submits that the due process and equal protection issues asserted by appellants are not substantial because the reduction of no-fault benefits by the amount of duplicative governmental benefits has an obvious relation to legitimate state goals of providing for an adequate level of mandatory insurance benefits for the least cost. The differing treatment provided for private benefits is related rationally to differences between governmental and private benefits and to the goal of allowing no-fault insureds a practical, efficient means to increae their benefits at their own option.

For the foregoing reasons, State Farm requests that this appeal be dismissed.

Respectfully submitted,

BODMAN, LONGLEY & DAHLING

By: Theodore Souris and
James R. Buschmann
Attorneys for Appellee,
State Farm Mutual Automobile
Insurance Company
34th Floor, 100 Renaissance Center
Detroit, Michigan 48243
(313) 259-7777

July 18, 1979